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In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN C. VIERRETHER, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does § 212 of the Coast Guard Authorization Act of 1989 apply to cases that were pending before the Board for Correction of Military Records of the Coast Guard when it took effect on June 12, 1990?

2. If so, does a favorable decision of the BCMR become final agency action and fix an applicant's right to relief under 10 U.S.C. § 1552 upon expiration of the statutory 10-month deadline?

3. May an agency avoid the rule that it is bound by its own regulations by "suspending" a regulation merely because its observance has become inconvenient?

4. Does the stigma of a reenlistment code that bars reentry into any branch of the armed forces and adversely affects private employment trigger the due process right to a hearing?

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STEPHEN C. VIERRETHER, *Petitioner*,

v.

UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Stephen C. Vierrether,[1] formerly a Chief Boatswain's Mate in the United States Coast Guard, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. The case raises important questions regarding the application of procedural legislation to pending cases, the consequences of an agency's failure to comply with a statutory deadline which was specifically enacted to combat agency footdragging, the due process right to a hearing in connection with stigmatizing military reenlistment codes, and the power of an agency to "suspend" regulations that become inconvenient for a while.

Opinions Below

The Court of Appeals' *per curiam* affirmance, 6 Fed.3d 786, is reproduced in the Appendix ("App.") at 1a.

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[1] Chief Vierrether's name is pronounced "Vuh-*ree*-thur."

Its order denying rehearing and declining rehearing *en banc* is at App. 3a. The judgment and decision of the Court of Federal Claims, 27 Fed. Cl. 357 (1992), are at App. 5a and 26a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988). The judgment of the Court of Appeals was entered on September 8, 1993. A timely petition for rehearing was denied on October 14, 1993.

Constitutional, Statutory and Regulatory Provisions

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Section 1169 of title 10, U.S. Code, provides:

> **§ 1169. Regular enlisted members; limitations on discharge**
>
> No regular enlisted member of an armed force may be discharged before his term of service expires, except—
>
> (1) as prescribed by the Secretary concerned;
> (2) by sentence of a general or special court-martial; or
> (3) as otherwise provided by law.

The military record correction statute, 10 U.S.C.A. § 1552 (West Supp. 1993) provides in pertinent part:

> (a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.
>
> * * *
>
> (4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

Section 212 of the Coast Guard Authorization Act of 1989, Pub. L. No. 101-225, 103 Stat. 1914, *reproduced in* 10 U.S.C.A. § 1552 note (West Supp. 1993) ("§ 212") directed the Secretary of Transportation ("the Secretary"), not later than June 12, 1990 (six months after enactment on December 12, 1989) to—

> (1) amend part 52 of title 33, Code of Federal Regulations, governing the proceedings of the [Board for Correction of Military Records ("BCMR")] to ensure that a complete application for correction of military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt; and

> (2) appoint and maintain a permanent staff, and a panel of civilian officers or employees to serve as members of the [BCMR], which are adequate to ensure compliance with paragraph (1) of this subsection.
>
> The BCMR's regulations provide:
>
> . . . Section 212 of the Coast Guard Authorization Act of 1989 provides that the Secretary shall ensure that final action on a complete application for correction is taken within 10 months of its receipt.

33 C.F.R. § 52.2(a) (1993).

At the time of petitioner's discharge, § 6-L-1 ("Desirability of Retention in the Coast Guard—Administrative Discharge Board") of the Coast Guard's Administrative Investigations Manual ("AIM") provided, in pertinent part:

> 1. *General.* Enlisted personnel of the Coast Guard may not be separated from the service with an other than honorable discharge unless they have been provided the opportunity to appear before an administrative discharge board. Similarly (with a few exceptions), enlisted personnel of the Coast Guard with more than 8 years total service may not be denied reenlistment, or be separated prior to the end of an enlistment, unless they have been provided the opportunity to appear before an administrative discharge board. . . .

Article 12-B-5 ("Processing Procedures for Personnel Not Eligible for Reenlistment") of the Coast Guard's Personnel Manual ("Personnel Manual") provides, in

pertinent part:

> c. A member with 8 or more years of total active and/or Reserve military service shall be notified, in writing, . . .
>
> (2) That the member has the right to present the case and appear in person before a reenlistment board.

Article 12-B-9 ("Processing Procedures for Unsatisfactory Performers") of the Personnel Manual provides, in pertinent part:

> d. *Procedures for Notification of Unsatisfactory Performers.*
>
> (1) A member whose record of performance (12 months are preferred in majority of cases, but not less than 6 months for extremely poor performance cases) is such that he/she could be eligible for discharge under the provisions of this article must be notified in writing that a discharge by reason of unsatisfactory performance may result if the unsatisfactory performance trend continues for the next 6 months. [Form notification letter omitted.]
>
> * * *
>
> e. *Discharge Processing.*
>
> (1) *Procedures for Notification of Discharge.* After notification of unsatisfactory performance and after further close observation of

> the member (in most cases for 6 months), if there has not been a substantial improvement in the member's performance he/she will be notified in writing of the proposed discharge action. The official notification will be in letter form according to the following sample:
>
> * * *
>
> (c) You have the right to present your case and appear in person before an administrative discharge board. (Omit for members with less than 8 years Regular or Reserve service).

Statement of the Case

Congress has provided that regular enlisted personnel may be discharged before the end of their enlistment only as prescribed by the Secretary concerned, by sentence of a general or special court-martial, or as otherwise provided by law. 10 U.S.C. § 1169 (1988). By regulation, Coast Guard enlisted personnel with over eight years' service cannot be discharged prior to the end of an enlistment unless they are afforded a trial-type hearing before an administrative discharge board. Personnel Manual art. 12-B-9; AIM § 6-L-1.

In early 1988, fearing budget cuts, the Coast Guard decided to reduce expenses. One of the steps it took was to offer "early-outs." When this did not generate the desired response, it resorted to an involuntary discharge program under which the right of personnel with more than eight years' service to an administrative discharge board was "suspended." On June 2, 1988, Chief Vierrether was discharged under this program, despite the fact that his enlistment was not due to expire until August 29, 1990, and

even though his superiors did not consider his performance to be such as to warrant proceedings to discharge him. At the time of his discharge, he had 17 years, 11 months and three days' service. It is undisputed that if he had had 18 years' service, he would have been permitted to remain on active duty long enough to qualify for retirement.

Having produced a sufficient number of discharges, the involuntary discharge program was terminated in May 1988.

Chief Vierrether received an honorable discharge, but a reenlistment eligibility classification code of "RE-4." Such a code renders a person ineligible for reenlistment in any branch of the military and adversely affects civilian employment opportunities. Robert H. Joost & Nancy Battaglia, *The Board for Correction of Military Records of the Coast Guard: A Unique Dispute Resolution Mechanism*, 41 Ad. L. Rev. 441, 453 n.47 (1989).

Immediately after his discharge, Chief Vierrether sought relief from the BCMR under 10 U.S.C. § 1552. That statute requires the Secretary to act through boards of civilians when ruling on record-correction applications. Unless procured by fraud, corrections under § 1552 are final and conclusive on all officers of the United States. *Id.* § 1552(a)(4). The statute does not require the Secretary or anyone acting on his behalf to review the BCMR's decisions. Only those categories of cases in which the Secretary, by regulation, provides that there be further review after the BCMR has acted are subject to such review. While the Department of Transportation ("DOT") has chosen to provide for secretarial review in some types of cases, 33 C.F.R. § 52.64 (1993), the lion's share—approximately 95%—of BCMR decisions are not subject to any further review within DOT once the board has acted. 55 Fed. Reg. 18001, 18002 (1990); Joost & Battaglia, *supra*, at 457 n.56, 458 n.60. RE codes in particular "are rarely involved in review by the delegate of the Secretary." *Id.* at 459.

Before the BCMR, Chief Vierrether argued, among other things, that the Coast Guard was bound by its regulations, that he had a right to a hearing before an administrative discharge board, and that the program under which he was discharged did not meet the Personnel Manual's requirements for a convenience of the government discharge. His request for a hearing before the BCMR was denied, but the board unanimously ruled for him on the merits, finding that the Coast Guard had violated its discharge regulations by not affording him a hearing before an administrative discharge board. It also found that the Coast Guard had committed an injustice in not granting him the same right to serve through retirement eligibility as it afforded to those who had served 18 years. App. 27a.

Dates are important in this case. The board decided the case on or before December 13, 1989. On February 7, 1990, a DOT Assistant General Counsel commented on the board's decision.[2] After receiving further submissions from the parties in light of those comments, the board (on a date the government has advised us it is unable to determine) handed down a second decision unanimously holding that Chief Vierrether had been wrongly denied the right to a hearing under the AIM. App. 32a. It ordered that his discharge be voided, that his record be corrected to show that he served continuously for 20 years, at which time he retired, and that he be paid whatever is due him as a result. DOT's Deputy General Counsel disapproved this decision and denied Chief Vierrether's application on April 18, 1991. App. 41a. This was more than 10 months after the requirements of § 212 took effect.

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[2] The Court of Federal Claims mistakenly attributed this action to the *Deputy* General Counsel. App. 9a n.4.

June 2, 1988	Date of discharge
June 3, 1988	Application filed with BCMR
December 12, 1989	§ 212 signed into law
December 13, 1989	BCMR's first decision
June 12, 1990	§ 212 takes effect
post-July 20, 1990	BCMR's second decision (precise date unknown)
April 12, 1991	**Expiration of § 212 deadline for final agency action**
April 18, 1991	Deputy General Counsel's decision reversing BCMR

Chronology of Agency Action

The Court of Federal Claims dismissed Chief Vierrether's Tucker Act complaint, 27 Fed. Cl. 357 (1992), App. 5a, holding that his discharge was authorized under the Personnel Manual, App. 11a-14a, that there was no right to a hearing, *id.* 14a-19a, and that an RE-4 reenlistment code is not stigmatizing. *Id.* 19a-23a. The court further held that because his BCMR application was filed before passage of § 212, that statute—whatever its effect—did not apply. *Id.* 24a. The Court of Appeals affirmed without opinion. *Id.* 1a.

Reasons for Granting the Writ

Certiorari should be granted because the decisions below violate this Court's precedents regarding (1) the application of new procedural legislation to pending cases, (2) the consequences of an agency's failure to act within a statutory deadline, and (3) the binding character of agency regulations. In addition, certiorari should be granted to review the important and unresolved constitutional issue of whether a reenlistment code that bars reenlistment and adversely affects civilian employment is stigmatizing for purposes of the due process right to a hearing.

I

THE DECISION BELOW CONFLICTS WITH *BRADLEY v. RICHMOND SCHOOL BOARD*, *BROCK v. PIERCE COUNTY*, AND *SERVICE v. DULLES*

The Court of Appeals erred because the special deadline Congress imposed on DOT plainly applies to BCMR cases that were pending on June 12, 1990 and rendered the BCMR's decision final when the statutory period expired without action by the Deputy General Counsel. It also erred because the Coast Guard had no right to suspend the regulations under which career enlisted personnel such as Chief Vierrether enjoy the protection of a trial-type hearing before they may be discharged prior to the end of their enlistment. These are important and recurring issues, since Chief Vierrether is not the only Coastguardsman whose favorable BCMR decision the Deputy General Counsel has attempted to overturn despite expiration of the statutory deadline. Nor, given the decision below and the substantial prospect of austerity budgets in the future, is there anything to prevent the Coast Guard or any of the other armed services from suspending the right to an administrative discharge board the next time they fear a budget cut. The career enlisted personnel on which the military depends are entitled to better. They have as much right to insist that agencies adhere to their own regulations as do broadcasters, electric utilities and everyone else in our society whose affairs are affected by government.

A

SECTION 212 APPLIES TO CASES PENDING ON JUNE 12, 1990

Section 212 imposed a ten-month deadline for decisions on applications to the Coast Guard BCMR. It was passed in response to a pattern of lengthy agency delays, and directed the Secretary, not later than June 12, 1990 to the BCMR's regulations to ensure that complete applications are processed expeditiously and that final action is taken within 10 months of their receipt. Section 212 also required the Secretary to "appoint and maintain a permanent staff, and a panel of civilian officers or employees to serve as members of the [BCMR], which are adequate to ensure compliance with" the 10-month requirement.

This petition presents two related issues under § 212. First, does it apply to BCMR cases that were pending on June 12, 1990, and second, if it does, may DOT overturn a BCMR decision in an applicant's favor *after* the 10-month period has expired? The courts below saw no need to reach the second issue because of their incorrect approach to the first.

These issues are worthy of a grant of certiorari. The government has appealed two cases holding that § 212 is preclusive to the Court of Appeals for the District of Columbia Circuit. *Gazlay v. Busey*, 819 F. Supp. 29 (D.D.C. 1993) (Greene, J.), *and Gottlieb v. Peña*, Civil No. 92-1667 (D.D.C. Apr. 26, 1993) (Jackson, J.), *consolidated appeal pending sub nom. Gottlieb v. Peña*, Nos. 93-5182 & 93-5183 (D.C. Cir.). A decision on § 212's applicability to cases pending on June 12, 1990 would also affect an unknown number of other cases. One Coast Guard BCMR case has been pending for nearly six years. H.R. Rep. No. 146, 103d Cong., 1st Sess. 18 (1993). Absent a determination that the § 212 "clock" also runs as to pending cases, there is every reason

to fear that DOT will continue to allow however many of these old cases there are to remain in limbo. Even if these applicants ultimately prevail, the difficulty of fashioning effective make-whole relief when there is a prolonged gap in a service-member's record, training and experience is self-evident.

More broadly, certiorari is appropriate to help clarify the applicability of new procedural requirements to pending cases. By the time the § 212 regulations were required to be promulgated, on June 12, 1990, Chief Vierrether's application had been pending more than two years. Because it is a procedural measure and does not unfairly upset settled expectations or contractual arrangements, § 212 clearly applies to such a case.

Neither of the courts below cited any authority for holding that § 212 does not apply to cases pending on June 12, 1990. The only opinion is that of the Court of Federal Claims, which reasoned that

> [t]he plaintiff filed his petition with the Coast Guard BCMR on June 3, 1988. The legislation became effective on December 12, 1989. If the court applied the 10-month rule, the deadline for final BCMR action would have expired on April 2, 1989. Thus, by the time the rule came into being, the 10-month deadline for a BCMR decision had already passed. It would be illogical to withdraw the BCMR's authority to render a decision just because the BCMR failed to meet a deadline that did not exist at the time. . . . App. 24a.

This treatment of the matter is entirely wrong. It obviously would make no sense to construe § 212 as if the 10-month period ran before it even took effect. We made no such argument. For cases such as this, which were pending

when the measure took effect, the period is to be calculated from that date, not some earlier date. By this conservative and proper standard, Chief Vierrether is entitled to the benefit of § 212.

The decision below is contrary to *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and irreconcilable with the views expressed by the United States and the Equal Employment Opportunity Commission as *amici curiae* in *Landgraf v. USI Film Products*, No. 92-757, and *Rivers v. Roadway Express, Inc.*, No. 92-938. Citing *Bradley*, the government there suggested (at 8)

> a rule that is both fair and consistent with Congress's purpose in enacting new legislation: when Congress has not prescribed how new statutes are to be applied to pending cases, substantive provisions (such as those prohibiting conduct that was not illegal before) should not be applied to pending cases. On the other hand, procedural and remedial provisions may be applied to pending cases unless doing so would result in "manifest injustice."

Like the statute for the correction of military records, 10 U.S.C. § 1552,[3] § 212 is remedial legislation. Setting a time limit for final agency action is unquestionably a matter of procedure. It certainly cannot be treated as substantive, since it does not make illegal military personnel actions or records that previously would not have constituted an error or injustice under § 1552. But even if § 212 were deemed substantive, as the government implau-

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[3] *See Kalista v. Secretary of the Navy*, 560 F. Supp. 608, 611 (D. Colo. 1983), *citing Oleson v. United States*, 172 Ct. Cl. 9 (1965); 40 Op. Att'y Gen. 504, 508 (1947).

sibly maintained below, calculating the 10-month period only from June 12, 1990 affords DOT the full benefit of the six-months-long "heads up" which Congress built into § 212. Applying § 212 in this fashion to cases that were pending on that date scarcely results in "manifest injustice" to the agency. This is especially true here because Chief Vierrether's application had been filed over two years before June 12, 1990, and DOT therefore actually had far more than 10 months in which to complete its task.

Under the Solicitor General's approach in *Landgraf*, with which we basically agree, "the first step is to determine, if possible, what Congress intended." Looking at the statutory text, the 1989 Act of which § 212 was part, was, with exceptions not here relevant, effective upon approval. Pub. L. No. 101-225, § 309, 103 Stat. 1926. Section 212, however, imposed obligations on DOT that would only take effect six months later, on June 12, 1990. Nothing in the statutory text or DOT's implementing regulation, 33 C.F.R. § 52.2(a) (1993), *supra* p. 4, excludes cases that would be pending on that date, whether filed before or after the date the statute itself became law.

The government's *Landgraf* brief correctly observed (at 17) that "[i]n the absence of clear evidence of congressional intent, it is proper for courts to presume that procedural and remedial provisions apply to pending cases" (capitalization deleted). Nothing in the legislative history of § 212 suggests that Congress did not intend it to apply to pending cases. This is not surprising since pending cases were the reason the measure was passed in the first place. To deny its benefit to the cases that gave rise to it would directly frustrate Congress's efforts. Indeed, not applying § 212 to pending cases denies its benefit to the very applicants who need it most: those with the oldest cases.

As remedial legislation, § 212 should be read generously for the benefit of those it was intended to aid: applicants. "[T]he nature and identity of the parties" are

pertinent to whether the measure should be applied to pending cases. *Landgraf, supra*, 968 F.2d 427, 432 (5th Cir. 1992). Here, the applicant is a member of a class for which the cases indicate an unusual measure of solicitude. *E.g., King v. St. Vincent's Hospital*, 112 S. Ct. 570, 574 n.9 (1991), *citing Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

On the other hand, applying § 212 to pending cases would in no sense disturb settled expectations worthy of judicial sanction. The Deputy General Counsel had no reason to expect she could review cases such as Chief Vierrether's without regard to the passage of time. Thus, the Administrative Procedure Act ("APA"), which governs BCMR proceedings, *e.g., Neal v. Secretary of the Navy*, 639 F.2d 1029, 1037 (3d Cir. 1981), imposes on agencies a duty to conduct the public business with reasonable dispatch. 5 U.S.C. § 706(1) (1988). Litigation under that provision, *Moore v. Board for Correction of Military Records of the Coast Guard*, Civil No. 87-2689 (D.D.C. 1988) (dismissed per stipulation), *noted in Gazlay, supra*, at 30, which is also referred to in the legislative history of § 212 and was settled shortly before Chief Vierrether's application was filed, directly alerted DOT to the fact that it needed to expedite its BCMR process. If § 212 required readjusting priorities within DOT's Office of General Counsel, the department had ample time to do so as a result of the six-month delay Congress built in.

The Court should hold this petition in abeyance pending decision in *Landgraf* and *Roadway Express*. Once they have been decided, it may wish to grant, vacant and remand this case for further consideration.

B

WHEN THE STATUTORY PERIOD EXPIRED, THE BCMR DECISION BECAME FINAL AGENCY ACTION AND FIXED CHIEF VIERRETHER'S RIGHT TO RELIEF

Since Chief Vierrether was entitled to the benefit of § 212, the next question is whether that measure precluded the Deputy General Counsel's attempt to reverse the BCMR because she acted more than 10 months after June 12, 1990. The only cases to have addressed this issue so hold. *Gazlay v. Busey, supra*; *Gottlieb v. Peña, supra*. Those cases properly apply *Brock v. Pierce County*, 476 U.S. 253 (1986). The courts below did not reach this issue in light of their incorrect holding that § 212 does not apply to cases that were pending on June 12, 1990.

Under *Pierce County*, congressional establishment of a deadline, "*standing alone*, is not enough to remove" an agency's power to act after the deadline. 476 U.S. at 262. At the same time, however, the Court cautioned that

> [w]e need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute. In this case, we need not go beyond the normal indicia of congressional intent to conclude that [the statute there at issue] permits the Secretary to [act] after the . . . deadline has expired.

Id. at 262 n.9. It went on to examine the purpose and legislative history of the measure before it when concluding that disregard of the deadline at issue did not terminate the agency's authority. In *United States v. James Daniel Good Real Property*, No. 92-1180 (U.S. Dec. 13, 1993), slip op. 21,

the Court again recognized the need to consider the specific "structure and history" of statutory timing provisions when deciding the consequences of agency violations. Under this approach, which is properly attentive to the background and purposes of legislation, § 212 must be afforded the effect we ascribe to it.

As Judge Greene observed in *Gazlay*,

> here Congress clearly intended to set a mandatory deadline for agency action. The deadline was not merely a minor piece of a larger integrated Act. Section 212 of the Authorization Act was a narrowly targeted piece of legislation passed for the sole purpose of ending Coast Guard BCMR delays. *See* H.R. Rep. No. 227, 101st Cong., 1st Sess. 32-33. Nor was this generic legislation. No such deadline is imposed on the review boards of other agencies such as the Army or Navy. As the House Report makes apparently [*sic*; presumably should read "abundantly"] clear, in enacting section 212 Congress wished to end the long delays accompanying action by the Coast Guard BCMR. In light of the legislative history, it cannot be disputed that Congress intended the ten month limit to be a mandatory deadline.

819 F. Supp. at 31. He correctly added that "when the BCMR resolves the application within the Congressionally-mandated window, the decision should be found to be a final decision. Beyond the ten-month period, the agency was without authority to take further action." *Id.* (footnote omitted).

Judge Greene's analysis, adopted by Judge Jackson in *Gottlieb*, is unassailable. With legislation such as this,

which is addressed explicitly and uniquely to the problem of delay by this particular agency, and which deals with *final* agency action rather than "internal timing requirements" such as those at issue in *Pierce County* or *Good Real Property*, a court that demands an *in haec verba* statutory articulation of the precise consequences of a failure to meet the deadline trifles with the legislative process and would plainly frustrate congressional intent. The fact that only *this* correction board (and not those for the Army, Navy/Marine Corps, Air Force and Public Health Service) has been subjected to a statutory time limit is strong evidence that § 212's deadline is not a mere procedural milepost, as in *Pierce County* or *Good Real Property*, or legislative exhortation that DOT try to work faster, but rather a reflection of abiding congressional concern that the substantive rights of Coast Guard personnel were being eroded through inordinate delay.[4] This unique legislative background is the very kind of evidence that takes the case out of the normal rule; the § 212 deadline does not "stand[] alone." *Pierce County*.

As explained in *Gazlay*, when Congress passed § 212, it acted in the knowledge that the *Moore* litigation under the APA's unreasonable delay provision had proven ineffective in obtaining prompter action by this particular BCMR. That litigation was specifically referred to in the legislative history. H.R. Rep. No. 227, *supra*, at 32-33, *reproduced in*

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[4] The fact that § 212 was enacted to confer a benefit on BCMR applicants rather than on the government further serves to distinguish it from internal timing requirements such as those at issue in *Good Real Property*, where the Court properly observed (at 21-22) that "[i]t would make little sense to interpret directives designed to ensure the expeditious collection of revenues in a way that renders the Government unable, in certain circumstances, to obtain its revenues at all." Far from frustrating a congressional purpose, as would have been the result had Good prevailed on this part of his case, Chief Vierrether's reading of § 212 directly serves the congressional purpose.

1989 USCCAN 1393-94; *see also* 135 Cong. Rec. H9310-11 (daily ed. Nov. 21, 1989).

Congress's awareness of the *Moore* litigation and the depth of congressional concern over Coast Guard BCMR delays are also apparent from a letter the Chairman and Ranking Member of the House Merchant Marine and Fisheries Committee submitted in response to DOT's notice of proposed rule making under § 212. App. 47a-49a. They strenuously objected to a proposed rule that would have eviscerated the 10-month deadline by providing that an application would not be deemed to have been filed (the triggering event under § 212) until not only the applicant's own basic submission and any applicable service and medical records were in hand, but also until the Coast Guard had submitted its views, the applicant had responded, and any hearing was completed. This was directly contrary to congressional intent as expressed in a section-by-section analysis published in the *Congressional Record*, and DOT relented in the (untimely) final version of the rule. 55 Fed. Reg. 31043 (1990). The episode is revealing not only as to this agency's hostility to what Congress set out to do, *see* Robert H. Joost & Nancy Battaglia, *Correcting Coast Guard Records*, 116 Naval Inst. Proc. 115, 117 (1990) (urging repeal of 10-month deadline),[5] but also as to Congress's refusal to close its eyes to DOT's transparent effort to thwart the purpose of the legislation.

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[5] The authors of this article are the chair and deputy chair of the BCMR. While they write in their private capacity, their argument for repeal bespeaks a recognition that expiration of the 10-month period has preclusive effect. Actions taken in their official capacity also indicate that the deadline is a real one from which real consequences flow, rather than merely an aspiration it would be nice to achieve. Thus, the BCMR routinely advises applicants who seek more than the allotted 15 days in which to reply to Coast Guard advisory opinions, 33 C.F.R. § 52.82(d) (1993), that the 10-month deadline will be delayed on a day-for-day basis for any delay they seek.

In light of this history, there can be no doubt as to Congress's intent. Nonetheless, since neither of the courts below reached this issue, the Court may wish, rather than deciding the matter itself in the first instance, to include in the remand suggested in connection with the first Question Presented a direction that the Court of Appeals also decide whether the 10-month deadline insisted upon by Congress is preclusive, as held in *Gazlay* and *Gottlieb*, and therefore entitles Chief Vierrether to the relief he was afforded by the BCMR.

C

AN AGENCY MAY NOT "SUSPEND" A REGULATION CONFERRING THE RIGHT TO A HEARING MERELY BECAUSE IT HAS BECOME INCONVENIENT

The Court of Appeals did not even attempt to explain why the Coast Guard could suspend the regulations under which Chief Vierrether was entitled to a hearing before an administrative discharge board. For its part, the Court of Federal Claims relied on the notion that the Commandant of the Coast Guard "has the authority to modify his own directives" and that suspending a regulation is no different from replacing or cancelling it. App. 17a. For these propositions it cited neither statute nor case law.

The trial court's theory was plainly wrong. Permitting an agency to suspend regulations as important as those here at issue merely because they have temporarily become inconvenient, only to reimpose them after the inconvenience has passed, is at war with the principle of government under law. An agency is bound by its regulations. *E.g., Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959). There is no more fundamental concept in federal administrative law.

The Coast Guard had no authority to suspend the regulations under which personnel with over eight years' service had a right to a predischarge trial-type hearing. Neither the APA nor title 14 of the United States Code confers on it a power to suspend regulations. *See* 5 U.S.C. § 301 (1988) (heads of departments "may prescribe regulations"); 14 U.S.C. § 632-33 (1988) (Commandant may "issue" rules, orders and instructions and "promulgate" regulations and orders). Nor can the Coast Guard *change* procedural regulations to its members' detriment with respect to past conduct, *see Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370, 389 (1932), *discussed in* Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* 308-09 & nn.5-6 (1993). It certainly cannot turn a regulation on and off as if it were a household appliance. That is what happened here.

The Court of Federal Claims sought to avoid this by theorizing that

> the effect of ALCOAST 22/88 was to replace [P]ersonnel [M]anual article 12-B-9 with a provision continuing the right to an administrative discharge board for most members but excepting those members targeted for discharge under the RIF program. App. 17a.

The short answer is that this is simply not what happened as a matter of history. The Coast Guard never amended Article 12-B-9 or replaced it with anything else. It did not issue a *new* regulation attempting to dispense with the right to a hearing for personnel "over eight." Instead, it merely decided that it was inconvenient to comply with the hearing provisions of the Personnel Manual and AIM. Neither the government nor either of the two courts below was able to point to any case that permits such action.

To say, as the Court of Federal Claims did, that it is "as if" the Coast Guard had issued a new regulation that kept the right to a hearing for everyone but those who were being deprived of it under the involuntary discharge program is transparently circular and makes a mockery of the principle that an agency is bound by its regulations. An agency's violation of its regulations cannot be forgiven by the simple expedient of treating them "as if" they had been rewritten so they no longer applied to the very persons as to whom they are being violated. In another context, such an approach would be dismissed as "at best, facetious." *See Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

The Coast Guard's "suspension" of its own hearing requirements is the antithesis of procedural regularity. It proceeded on the assumption that its own convenience can take higher priority than the rights of the individual provided only that it takes the trouble to gives its actions a semblance of legality. The *trompe l'oeil* technique is fine for painting, but has no place in a system of law. Indeed, in a very real sense, a fig-leaf such as that deployed by the Coast Guard is even worse than other species of agency disregard for binding regulations since it trades on appearances and, in so doing, debases public respect for government as a whole.

The rule that an agency is bound by its regulations is fundamental and cannot be evaded by invoking a power of suspension. Given the decision below and the prospect of additional austerity budgets in the future, the Coast Guard is likely to repeat itself unless this Court intervenes.

II

THE DECISION BELOW RAISES AN IMPORTANT CONSTITUTIONAL ISSUE REGARDING THE RIGHT TO A HEARING THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Absent some contrary statute or regulation or conviction by a court-martial, Chief Vierrether had a right to serve to the end of his enlistment. 10 U.S.C. § 1169 (1988). His livelihood as well as his reputation were harmed by his premature discharge because the RE-4 code bars reentry into any branch of the armed services and adversely affects civilian employment. As a result, he had a due process right to a predischarge hearing. *See Paul v. Davis*, 424 U.S. 693, 708-10 (1976); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-45 (1985).

Adverse RE codes are issued to many departing servicemembers each year. They are widely understood to be stigmatizing. *E.g., Keef v. United States*, 185 Ct. Cl. 454, 467 (1968); *Rogers v. United States*, 24 Cl. Ct. 676, 684 n.14 (1991), *aff'd mem.* 996 F.2d 317 (Fed. Cir. 1993). The test is whether the discharge "albeit honorable, either casts a stigma on the serviceman *or* has some derogatory connotation." *Keef, quoted in Rogers, supra*, at 684 (emphasis added).

RE-4 codes in particular are clearly stigmatizing. As the chair and deputy chair of the BCMR have written,

> [t]he Coast Guard, like the other military services, assigns a reenlistment code rating to each person whom it discharges from active duty. An RE-1 code means the person is eligible to reenlist, but an RE-4 code means he or she is not eligible to reenlist. *All of the military services, the National Guard and*

> *Reserves, and some private employers tend to reject applicants who have received an RE-4, regardless of circumstances.*

Joost & Battaglia, *The Board for Correction of Military Records of the Coast Guard: A Unique Dispute Resolution Mechanism, supra*, at 453 n.47 (emphasis added). An RE-4 "not only prohibits reenlistment, but also indicates to private employers that the individual presented some type of problem for the military." Heilman, *The Constitutionality of Discharging Homosexual Military Personnel*, 12 Colum. Hum. Rts. L. Rev. 191, 194 (1980-81).

Keef, relied on by the Court of Federal Claims, App. 19a-21a, is plainly inapposite. That case rejected a claim that an RE-2 was stigmatizing, noting that Keef

> has not indicated why he will be stigmatized. Innumerable reasons exist for not permitting a serviceman to reenlist after he has been discharged for the government's convenience. Plaintiff's discharge form does not indicate any derogatory reasons for denying him the opportunity to re-enlist, and we find therefore that, standing alone, the mere fact that he cannot re-enlist is not a stigma.

In contrast, Chief Vierrether received an RE-4, which is plainly more emphatic a bar than an RE-2. "Any code other than RE-1 might cause an employer to wonder about a veteran's military service," David F. Addlestone *et al.*, *Military Discharge Upgrading and Introduction to Veterans Administration Law* § 7.2.2.1, at 7/9 (1982), and "even though some non-RE-1 codes do not actually stand for something bad," *id.* & n.50a, employers well know that an RE-4 makes a strong statement about the service's feelings on the matter. *See* Joost & Battaglia, *supra*. Not so

with the RE-2 at issue in *Keef*.

An RE-4 in the specific case of a chief petty officer with nearly 18 years of active duty is a red flag that something was seriously wrong with his military service. As one perceptive commentator observed nearly 20 years ago:

> Even an Honorable Discharge after eighteen years of service would have been a severe punishment since involuntary release of a senior enlisted man would inevitably raise questions in the minds of prospective employers.

Andrew S. Effron, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 Harv. Civ. Rgts.—Civ. Lib. L. Rev. 227, 254 (1974). Thus, Chief Vierrether's RE-4 not only precluded his reentry into the military—enough, in itself, to trigger the Due Process Clause—but also adversely affected his ability "to take advantage of other employment opportunities." *See Paul v. Davis, supra*, at 710, *quoting Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *cf. Loudermill, supra*, at 543, *citing Lefkowitz v. Turley*, 414 U.S. 70, 83-84 (1973) (fired worker's search for other employment "likely to be burdened by questionable circumstances under which he left his previous job").

RE-4s are stigmatizing. That stigma is all the more palpable where, as here, the recipient is a career enlisted member. Even if the Coast Guard could "suspend" its regulations guaranteeing a predischarge evidentiary hearing, Chief Vierrether was still entitled to such a hearing as a matter of due process. Certiorari should be granted because of the importance of this issue and the number of persons potentially affected by it.

Conclusion

For the foregoing reasons, certiorari should be granted.

Respectfully submitted.

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DECEMBER 1993

United States Court of Appeals
FOR THE FEDERAL CIRCUIT

93-5082

STEPHEN C. VIERRETHER,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL FROM THE
UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 91-1482C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED.

Per Curiam (PLAGER and RADER, *Circuit Judges*, and WOODS, *District Judge**). See Fed. Cir. R. 36.

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* Judge George E. Woods, United States District Court for the Eastern District of Michigan, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/
Francis X. Gindhart, Clerk

DATED September 8, 1993

United States Court of Appeals
FOR THE FEDERAL CIRCUIT

93-5082

STEPHEN C. VIERRETHER,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on October 21, 1993.

FOR THE COURT,

/s/
FRANCIS X. GINDHART, CLERK
By Diane M. Frye
Chief Deputy Clerk

Dated: October 14, 1993

cc: EUGENE R. FIDELL
DEAN L. GRAYSON

VIERRETHER V. US, 93-5082
(CFC - 91-1482C)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

In the United States Court of Federal Claims

No. 91-1482C

(Filed: December 23, 1992)

STEPHEN C. VIERRETHER, *Plaintiff,* v. THE UNITED STATES, *Defendant.*	)	Military back pay; reduction in force program; right to predischarge hearing.

Eugene R. Fidell, Washington, D.C., for plaintiff. Mary G. Hynes, of counsel.

Dean L. Grayson and Hillary A. Stern, Civil Division, Washington, D.C., with whom were David M. Cohen, Director; Sharon Y. Eubanks, Assistant Director; and Stuart M. Gerson, Assistant Attorney General, for the defendant. Paul Samuel Smith, U.S. Department of Transportation, of counsel.

OPINION

MARGOLIS, Judge.

This military back pay case comes before the court on the defendant's motion for summary judgment and the plaintiff's cross motion for summary judgment. The

plaintiff, Stephen Vierrether, is a former Chief Boatswain's Mate in the Coast Guard. The Coast Guard instituted an involuntary reduction in force program during 1988, and through this program Vierrether was involuntarily, but honorably, discharged from the Coast Guard on June 2, 1988. Vierrether alleges that the Coast Guard discharged him without a hearing before the Coast Guard administrative discharge board prior to his discharge. He contends he is entitled to such a hearing under Coast Guard personnel regulations and under the Due Process Clause of the U.S. Constitution. He also attacks his discharge for various procedural defects and alleges that the decision of the Coast Guard Deputy General Counsel upholding his discharge was arbitrary and capricious and void because it came after the statutory time deadline. He seeks correction of his military records, back pay and allowances, attorney's fees and costs.

After careful review of the record and after oral argument, this court finds that the defendant is entitled to judgment as a matter of law. Accordingly, the court grants defendant's summary judgment motion and denies the plaintiff's cross motion for summary judgment.

FACTS

The RIF Program

In December 1987, Congress enacted a budget that restricted the appropriation for the Coast Guard. This caused a budget shortfall. The Coast Guard Command opted to meet the shortfall in part by reducing its personnel. The Coast Guard first implemented a program to permit personnel to leave the service voluntarily, known as the "voluntary early out program." This

program failed to reduce personnel sufficiently. The Coast Guard then instituted, on February 23, 1988, an involuntary reduction in force ("RIF") program. The order implementing the RIF was known as ALCOAST 22/88[1]. ALCOAST 22/88 announced that any enlisted service member who met the following criteria was a candidate for an involuntary discharge:

> A. has a characteristic average of less than 3.0 for any factor using all marks assigned on two most recent performance evaluations prior to [date time group] of this ALCOAST . . . .
>
> B. is presently on performance probation in accordance with art. 12-B-9 of [Coast Guard Personnel Manual].
>
> C. has, prior to this [message], been awarded nonjudicial punishment/convicted by a summary court martial two or more times in the preceding 12 months.
>
> D. has been convicted by a special or general court-martial within the preceding 24 months.

In normal circumstances, Coast Guard members with 8 or more years of military service are entitled to a hearing before an administrative discharge board, if the Coast Guard intends to discharge them involuntarily prior to the end of their term of enlistment. ALCOAST 22/88 suspended the right to a hearing for members to be

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[1] The term "ALCOAST" is a designation used to identify directives from the highest levels of the Coast Guard: the Commandant, the Vice-Commandant or the Chief of Staff of the Coast Guard.

discharged under the RIF program.[2]

The plaintiff, Stephen Vierrether, had served in the Coast Guard for over 17 years and achieved the rank of Chief Boatswain's Mate. Although the parties disagree as to how to characterize Vierrether's overall performance, there appears to be no dispute that Vierrether's performance evaluations met one of the criteria in ALCOAST 22/88.[3] For the two most recent evaluations prior to ALCOAST 22/88, Mr. Vierrether's evaluations had a characteristic average of less than 3.0 for a t least two factors on the performance evaluation. The plaintiff claims that those particular performance evaluations were the result of bias and prejudice against him.

On March 17, 1988, the Coast Guard issued another order, ALCOAST 25/88. ALCOAST 25/88 applied to all of the Coast Guard members who met the criteria in ALCOAST 22/88. ALCOAST 25/88 asked commanding officers to submit the names of any members who the commanding officer could recommend to be retained in the Coast Guard. ALCOAST 25/88 established a panel to review these recommendations to determine which members would be retained. It further directed the Coast Guard to Retain members who had 18 or more years of

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[2] The order explained specifically that "those members COMDT (G-PE) directs to be discharged under this program will receive a [convenience of the government] discharge [in accordance with] Art. 12-B-12a(1) of [the Coast Guard Personnel Manual]. For the purpose of this involuntary RIP program, the requirement for completion of a probationary period under Art. 12-B-9 of [the Coast Guard Personnel Manual] is suspended, as is the requirement for an admin[istrative] discharge board for members with 8 or more [years] of military service."

[3] From the record it appears that service members, including Vierrether, are evaluated at least twice each year. Each evaluation measures a service member's performance using six overall "factors": military factor, team factor, work factor, leadership factor, representation of the Coast Guard factor, and human factor.

service until they were eligible to retire.

Vierrether's commanding officer recommended that the Coast Guard retain Vierrether because Vierrether had service of 17 years and 9 months. A panel of coast Guard officers and enlisted personnel thereafter reviewed Vierrether's entire military service record and decided to discharge him. Vierrether requested a waiver to allow him stay in the service until he reached 20 years of service, but this request was denied. Vierrether was discharged on June 2, 1988, with an honorable discharge and an RE-4 code on his discharge form indicating that he was not permitted to reenlist.

The BCMR Review

On June 3, 1988, Vierrether submitted a petition to the Coast Guard Board for Correction of Military Records ("BCMR") pursuant to 10 U.S.C. § 1552, seeking to set aside his discharge. Vierrether argued that it was unlawful for the ALCOASTs to suspend the right to a hearing before an administrative discharge board. He argued on several grounds that the ALCOASTs purported suspension of that right was ineffective, that he had a separate right to predischarge hearing under the Due Process Clause, and that his performance evaluations were the product of bias and prejudice.

The BCMR concluded that the Coast Guard violated its regulations by refusing Vierrether a predischarge hearing.[4] The Deputy General Counsel ("Depu-

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[4] According to the plaintiff, this decision was actually the second BCMR ruling on his case. On or about December 13, 1989, the BCMR rendered a "first decision" in Vierrether's favor, and it forwarded this decision to the Coast Guard Deputy General Counsel for approval. The Deputy General Counsel reviewed this first decision and suggested that

ty"), acting on behalf of the Secretary of Transportation, overruled the BCMR's decision on April 18, 1991 and denied Vierrether's petition. The Deputy adopted the factual findings of the BCMR, but concluded that it was lawful to suspend the right to a hearing, the suspension was effective against Vierrether, and that an honorable discharge does not trigger any Due Process rights. Both the BCMR and the Deputy found no evidence of bias or prejudice in Vierrether's evaluations. This lawsuit followed.

DISCUSSION

The plaintiff bears a heavy burden of proof. This court may not reverse the Secretary's decision to overrule a BCMR decision unless the plaintiff can show, by "cogent and clearly convincing evidence," that the Secretary acted arbitrarily, capriciously, in bad faith, contrary to law or regulations, or that his determination was not supported by substantial evidence. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Jones v. United States*, 7 Cl. Ct. 673, 679 (1985); *Sanders v. United States*, 219 Ct. Cl. 285, 301-02 (1979). A court may not substitute its judgment for that of the Board of the Secretary if reasonable minds could differ. *Jones*, 7 Cl. Ct. at 679; *Sanders*, 219 Ct. Cl. at 302. This is true particularly in military back pay cases, because courts are obligated to allow the greatest deference to the armed services in their administration of personnel matters. *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Sanders*, 219 Ct. Cl. at 302.

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the BCMR consider additional arguments.

This court's analysis starts with 10 U.S.C. § 1169, which provides that "[n]o regular enlisted member of an armed force may be discharged before his term of service expires, except (1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law." 10 U.S.C. § 1169 (1988). This court and its predecessor, the Court of Claims, have frequently held that, so long as no statutes or regulations are violated, enlisted personnel in military service do not have a right to remain in the service until the expiration of their terms of enlistment. *Giglio v. United States*, 17 Cl. Ct. 160, 166 (1989); *Keef v. United States*, 185 Ct. Cl. 454, 463 (1968). Therefore, the plaintiff's discharge is void only if it exceeds applicable statutory authority, if it ignores procedural regulations or if it violates minimum concepts of basic fairness. *Giglio*, 17 Cl. Ct. at 166.

The plaintiff attacks his discharge on each of these grounds. His arguments cluster into several themes. First, he argues that the entire RIF program violated Coast Guard regulations. Seconds, he argues that he had a right to a hearing before an administrative discharge board prior to being discharged. Third, he argues he had a right to a predischarge hearing under the Due Process Clause. Fourth, he contends that the Deputy General Counsel and the BCMR acted arbitrarily and capriciously in failing to find that his performance evaluations were the product of bias and prejudice. Fifth, he argues that the decision of the Deputy General Counsel is void because it came after the statutory deadline.

I. Validity of the RIF Program

ALCOAST 22/88 specified that service members discharged under the RIF program would receive a dis-

charge for "convenience of the government." Vierrether alleges that the RIF program violated Coast Guard regulations on discharges for the convenience of the government. The Coast Guard Personnel Manual ("personnel manual") limits the circumstances in which the Coast Guard can discharge a service member for the convenience of the government. It provides that:

> a. The Commandant may authorize or direct the separation of enlisted personnel for the convenience of the Government for any of the following reasons:
>
> (1) General demobilization, reduction in authorized strength or by an order applicable to all members of a class of personnel specified in the order.

CGPM art. 12-B-12(a)(1). Vierrether argues that none of these three reasons applied to the RIF program. Because the parties agree that the first two reasons cannot justify this RIF program, the dispute centers on whether ALCOAST 25/88 was an order "applicable to all members of a class of personnel specified in the order." Each party offers a different interpretation of that phrase.

The defendant's interpretation focuses on the plain language of the regulation. The defendant notes that the personnel manual requires an order to apply to "a class" of personnel specified in the order. The defendant contends that ALCOAST 25/88 created three classes of personnel within the group authorized for discharge under ALCOAST 22/88: (1) those members whose commanding officers recommended them for retention; (2) those members whose commanding officers did not recommend them for retention; and (3) regardless of the

recommendation, those members with 18 years of service. ALCOAST 25/88 directed those in the first class to be considered for retention; it directed those in the second class to be discharged; and it offered a retirement option to those in the third class. The order to discharge members applied to all members in the second class of personnel. Therefore the order literally applied to "all members of a class of personnel specified in the order." This is consistent with the literal requirements in the personnel manual. According to this interpretation, it is no defect that the Coast Guard opted to retain some of the personnel in the first class.

The plaintiff contends that ALCOAST 25/88 violated the personnel manual. According to the plaintiff's interpretation, the relevant class of personnel is the class identified by the criteria in ALCOAST 22/88. ALCOAST 25/88 was unlawful because it ordered only some of the personnel in that class to be discharged, others to be retained permanently, and still others to be retained until retirement. Therefore, according to the plaintiff, ALCOAST 25/88 was not "applicable to all members" of the class specified in ALCOAST 22/88.

This court agrees with the defendant's interpretation of the personnel manual article 12-B-12(a)(1). That interpretation adheres to the literal wording of the regulations more closely than the plaintiff's interpretation. The regulation requires only that an order "apply to all members of a class of personnel specified in the order." ALCOAST 25/88 does exactly that because it applies to the class of members not recommended for retention. By contrast, using the plaintiff's interpretation would require the court to read the language to say that an order to discharge is valid only if it apply to all members of a class of personnel specified in that order or any related order. Such language is absent from the

regulation. The plain language is the best indication of the intent of a provision and is conclusive when there is no clear cut contrary intent. *See Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629-30 (Fed. Cir. 1989) (interpreting a statute).

The plaintiff complains that the purpose of article 12-B-12(a)(1) is to constrain the Coast Guard's discretion in discharging personnel for the convenience of the government, so the Coast Guard may not make individualized decisions about which members to discharge. Unfortunately, there is no authority interpreting this regulation that either supports the plaintiff's argument or contradicts it. Even if the plaintiff is correct, however, the argument would not help him. The Coast Guard made the alleged individualized decisions to retain some members after first identifying the personnel to be discharged. If the decision to retain some members was unlawful, the result would be to discharge all members meeting the criteria in ALCOAST 22/88. Vierrether would have been discharged even if there were no individualized decisionmaking. For all of these reasons, this court holds that the RIF program did not violate internal Coast Guard regulations.

II. Rights Under Coast Guard Regulations

Next, the plaintiff contends that the Coast Guard unlawfully denied him the right to a pre-discharge hearing before an administrative discharge board, to which he claims he was entitled under Coast Guard regulations. He makes numerous arguments.

A. Rights to a Predischarge Hearing in the Personnel Manual and the Investigations Manual

The plaintiff argues that two internal Coast Guard manuals state that service members with 8 or more years of service are entitled to an administrative discharge board hearing if they are to be discharged prior to the end of their enlistment. The first is the Coast Guard Personnel Manual. The second is the Administrative Investigations Manual ("investigations manual").

The plaintiff makes three arguments to the effect that either one or both of these manuals required that the Coast Guard grant him a hearing. First, he argues that each manual grants rights separately from the other, and the ALCOASTs only suspended those rights granted in the personnel manual, not those rights in the investigations manual. Therefore the provisions of the investigations manual granting a right to a hearing before the administrative discharge board remained effective. The plaintiff made this argument before the BCMR. The BCMR found it persuasive, but the Deputy General Counsel, acting on behalf of the Secretary, overruled the BMCR decision. The Deputy held that the investigations manual does not create rights separate from those in the personnel manual. Rather, the investigations manual only provides guidance for performing investigations that are authorized by other manuals. Therefore a change to the personnel manual also effects a change to the investigations manual.

This court may reverse the Deputy's decision only if the plaintiff shows that it was arbitrary, capricious, contrary to substantial evidence, or violated applicable law or regulations. *Boyd v. United States*, 207 Ct. Cl. 1, 8-9 (1975), *cert. denied*, 424 U.S. 911 (1976). The plain-

tiff has not met this standard.

There was substantial evidence supporting the Deputy's decision. She relied on language in the investigations manual itself that states it is a "general guide for investigations," and explains that "in the case of conflict [with other regulations], the other regulation will govern." This language strongly supports the conclusion that the personnel manual provisions control those of the investigations manual. The Deputy's decision articulated a reasonable basis in the record for her conclusion, and the plaintiff has offered little evidence that the decision was arbitrary, capricious, in bad faith, contrary to law or regulation, or that her determination was not supported by substantial evidence. It was immaterial that the Deputy cited a different version of the investigations manual than the version in effect at the time of Vierrether's discharge. The key language quoted above was in the correct version.

Second, the plaintiff argues that even if the personnel manual controls the provisions of the investigations manual, the personnel manual can only "modify" the provisions of the investigations manual, not "suspend" those provisions. The plaintiff asks the court to distinguish between a "modification" and a "suspension" of provisions. However, this court can discern no basis for such a distinction. The effect of ALCOAST 22/88 was to change the personnel manual to state that service members qualifying for a RIF are not entitled to an administrative discharge board hearing. That right continued to exist for all other service members. If this is not a "modification" of the manual, it is difficult to conceive what would be. Many modifications of the personnel manual may have the effect of suspending certain procedures for certain personnel or enhancing procedures for others.

Third, the plaintiff argues that the Commandant had no authority to suspend the provisions of either manual. Both the BCMR and the Deputy rejected this argument summarily, and this court sees no basis for reversing. Unquestionably, the Coast Guard Commandant has the authority to modify his own directives; the Coast Guard Directives system specifies that orders remain in effect until they are "replaced or cancelled" by the originator or higher authority. Both the personnel manual and the investigations manual are Commandant directives, as was ALCOAST 22/88. Therefore the Commandant did have the authority to suspend the provisions of both manuals. The plaintiff's contention that "suspending" a personnel manual provision is somehow different from "replacing or cancelling" a provision is equally unpersuasive. The effect of ALCOAST 22/88 was to replace personnel manual article 12-B-9 with a provision continuing the right to an administrative discharge board for most members but excepting those members targeted for discharge under the RIF program. Thus, it did "replace" the provision with a temporary new provision.

B. Cancellation of the RIF Program

Next, the plaintiff argues that Coast Guard cancelled the order creating the RIF program before it actually discharged Vierrether; therefore at the time of his discharge the right to a hearing was in effect. This argument also fails.

The order cancelling ALCOAST 22/88 was ALCOAST 34/88, given in May 1988, and it provided:

> 1. The programs promulgated . . . to reduce the number of enlisted personnel in the Coast Guard have had the desired effect. As of 13 May 88, over 850 enlisted members have been approved for separation or retirement under the voluntary and involuntary programs. Consequently, both the voluntary and involuntary enlisted personnel reduction programs are hereby terminated. All units with members being separated or retired have received authority for disch[arge]/relad or notification of approved retirement request by separate correspondence.
>
> 2. Members who have not already received approval or an early release will not be separate under this program. . . .

Vierrether received authority for his discharge in April 1988.

By the terms of ALCOAST 34/88, Vierrether was one of those "approved for separation" prior to the program's termination in May 1988. The plain language of ALCOAST 34/88 assumes that those service members authorized for discharge will be discharged and does not cancel directives authorizing the discharge of service members. This court therefore finds that ALCOAST 34/88 did not create any right to a hearing.

C. Notice of the Potential for Discharge

Finally, the plaintiff argues that his discharge was unfair because the Coast Guard changed its personnel regulations, and Vierrether had no previous notice that

his poor performance could cause him to be discharged without a hearing. This argument is also without merit.

The argument amounts to a due process challenge. Under due process analysis, an individual is entitled to certain procedures if he is deprived of a life, liberty or property interest. Vierrether, however, wa snot deprived of such an interest. Enlisted service members have no constitutional entitlement to remain in the service until the end of their terms of enlistment. *Keef*, 185 Ct. Cl. at 463-64. The Commandant has authority to issue, modify and rescind personnel rules, 14 U.S.C. § 632, and the Court of Appeals for the Federal Circuit has held that military service members have no entitlement to prevent the military from changing its personnel regulations. *Alberico v. United States*, 783 F.2d 1024, 1027 (Fed. Cir. 1986).

The plaintiff cites *Hanratty v. FAA*, 780 F.2d 33, 35 (Fed. Cir. 1985), for the proposition that a unilateral change in procedures is unfair. Hanratty, however, presented a different issue. Hanratty held that it violated due process for the Merit Systems Protection Board to use a standard for deciding the case that was different from the standard on the basis of which both parties submitted evidence. This is not the issue her.

III. Due Process Rights

The plaintiff next argues that his discharge casts a stigma on him, giving rise to a right to a hearing under the Due Process Clause of the U.S. Constitution. The settled rule is that if the regulations do not require notice and a predischarge hearing, they are required only if the discharge either casts a stigma on the service member or has some derogatory connotation. *Keef*, 185

Ct. Cl. at 467. The plaintiff claims that a stigma derives from the fact that the reenlistment code on his discharge document, an RE-4, bars his reenlistment. He claims that such a case, coupled with his long record of service, over 17 years, naturally tend to cast suspicion in the minds of employers over the circumstances of his discharge. The defendant argues that barring the plaintiff from reenlisting is not per se stigmatizing.

This court notes that honorable discharges may be stigmatizing if the discharge certificate includes a derogatory connotation. *Keef*, 185 Ct. Cl. at 467 (stating that notice and a hearing are required "only if the discharge, albeit honorable, either casts a stigma on the serviceman or has some derogatory connotation."). Two subsequent Claims Court cases held that an honorable discharge stigmatized a service member because the member's discharge certificate included derogatory information. *Casey v. United States*, 8 Cl. Ct. 234, 241 (1985) (discharge certificate included a code indicating the member wa discharged for drug and alcohol abuse); *Rogers v. United States*, 24 Cl. Ct. 676, 683-84 (1991) (same).

There is no derogatory connotation on Vierrether's discharge certificate; it merely states that he was discharged as a part of a general demobilization. Moreover, the Keef court considered facts virtually identical to the facts in this case and held that the plaintiff was not stigmatized. In *Keef* the service member had served 17 years and received reenlistment case RE-2 on his discharge form, which barred his reenlistment. The court concluded that the code, either by itself or when considered with plaintiff's long years of service, did "not indicate any derogatory reasons for denying him the opportunity to reenlist." It found that "the mere fact that he cannot re-enlist is not a stigma." *Keef*, 185 Ct.

Cl. at 469. The facts in *Keef* are the same in every material way to the facts in this case.

Keef is not distinguishable merely because Keef involved an RE-2 code while Vierrether's code is an RE-4. The only features about the RE-2 code that the *Keef* court found important were that it barred reenlistment and did not "indicate any derogatory reasons for denying [plaintiff] the opportunity to reenlist." *Keef*, 185 Ct. Cl. at 469. Both features are exactly the same for the RE-4 code used in this case. Accordingly, the plaintiff's claim that his discharge form stigmatized him is without merit.[5]

IV. The Performance Evaluations

The plaintiff challenges the findings of the BCMR and the Deputy General Counsel that there was no evidence of bias in Vierrether's performance evaluations. To establish that there was error, the plaintiff must prove two things: (1) that the Board proceedings contained legal error or a misstatement of a significant hard fact, and (2) that there was a causal nexus between the error and plaintiff's discharge. *Hary v. United States*, 223 Ct. Cl. 10, 17 (1980); *Sanders*, 219 Ct. Cl. at 301-02. The plaintiff's burden of proof is extremely high. This court will not substitute its judgment for that of the Coast Guard in evaluating the plaintiff's performance when reasonable minds could reach differing conclusions.

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[5] Even if plaintiff offered some evidence of a stigmatizing effect, it would not necessarily follow that due process requires that he receive a hearing prior to his discharge. A post-discharge hearing, such as his appeal to the BCMR, may be sufficient. *See Alberico v. United States*, 783 F.2d at 1028 (holding that service member is not necessarily entitled to predischarge hearing).

Sanders, 219 Ct. Cl. at 302.

The plaintiff has not met this burden. The court finds that the BCMR's determination is supported by substantial evidence in the record as a whole. First, there was substantial evidence in the record to conclude that the disputed performance evaluations were not aberrational, but consistent with the rest of the plaintiff's service record. Vierrether's performance evaluations were poor at times as early as 1984. He was frequently counseled to improve his performance. Once he was threatened with reduction in rate due to incompetency. It was also reasonable for the BCMR to accept unsworn evidence from either party. Regulations do not limit the BCMR in the kind of evidence it may consider. 33 C.F.R. § 52.24 (1991).

Moreover, the plaintiff's "sworn evidence" is insufficient to establish that Lt. Rall was biased or that there was a nexus between the alleged bias and the evaluations. The plaintiff must overcome the strong presumption that administrators of the military discharge their duties correctly, lawfully and in good faith. *Sanders*, 219 Ct. Cl. at 302. Vierrether's evidence consists of his own statement to the BCMR that there was a "personality conflict" between the plaintiff and Lt. Rall and that this conflict impaired Rall's ability to impartially evaluate the plaintiff's performance. He claims that Lt. Rall is not credible because Rall was personally involved with a supervisee of the plaintiff. Uncorroborated allegations are simply not enough to overcome the presumption that military officers, including Lt. Rall, discharge their duties faithfully. *Paskert v. United States*, 20 Cl. Ct. 65, 71 (1990) (citation omitted). Given the lack of evidence supporting the plaintiff's contentions, and without any apparent reason to do so, it was also not an error for the BCMR not to interview Lt. Rall.

Second, it was not an abuse of discretion for the Coast Guard to refuse to waive the 18-year service requirement to allow the plaintiff to continue his service until eligible to retire. The plaintiff simply did not have 18 years of military service.

Finally, he seems to claim that it was an abuse of discretion for the BCMR to permit the Coast Guard to discharge the plaintiff for past conduct. This last argument is merely a reformulation of his other legal arguments and is without merit.

V. The Statutory Deadline

The plaintiff next argues that the Deputy General Counsel was powerless to overturn the BCMR's decision granting relief to the plaintiff because the Deputy acted after a statutory deadline. Congress passed legislation requiring the Secretary to impose a 10-month deadline for final action on Coast Guard BCMR petitions. This legislation provides:

> Not later than 6 months after the date of the enactment of this Act, the Secretary of Transportation shall—
>
> (1) amend . . . [r]egulations . . . to ensure that a complete application for correction of military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt.

Coast Guard Authorization Act of 1989, Pub. L. No. 101-225, § 212, 103 Stat. 1914 (1989).

This court finds that the 10-month rule does not apply to Vierrether's petition because the statute authorizing the deadline was not passed until well after this petition was filed. The plaintiff filed his petition with the Coast Guard BCMR on June 3, 1988. The legislation became effective on December 12, 1989. If the court applied the 10-month rule, the deadline for final BCMR action would have expired on April 2, 1989. Thus, by the time the rule came into being, the 10-month deadline for a BCMR decision on the plaintiff's petition had already passed. It would be illogical to withdraw the BCMR's authority to render a decision just because the BCMR failed to meet a deadline that did not exist at the time. The legislation does not explicitly require retroactive application, and this court will not infer retroactivity if it will lead to such a result.[6]

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[6] The plaintiff seeks to change this result by suggesting that the court begin counting the time period 6 months after the effective date of the statute, when the regulations implementing the deadline were supposed to have been issued. The statute does not direct the court to apply the deadline to petitions filed prior to the legislation, and it would be inequitable to impose such a deadline.

It also appears that the BCMR's so-called final decision was only a recommendation to the Deputy. It was undated and left a space for the Deputy's signature. The Secretary, acting through the Deputy, unquestionably has review authority over BCMR decisions. 33 C.F.R. § 52.64 (1991). And though the BCMR's decision was entitled "final decision," its label is not conclusive in light of the fact that a previous BCMR decision in this case, labeled a "final decision," was characterized by the BCMR chairman as a "recommended decision."

Because this court finds that the deadline does not apply to the BCMR petition, it need not reach the question of whether the deadline cuts off the Deputy's power to render a final decision.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is granted, and the plaintiff's cross motion for summary judgment is denied. The clerk will dismiss the complaint. No costs.

/s/
Lawrence S. Margolis, Judge
United States Court of Federal Claims

December 23, 1992

In the United States Court of Federal Claims

No. 91-1482 C

STEPHEN C. VIERRETHER)
)
v.)
)
THE UNITED STATES)

JUDGMENT

Pursuant to the court's opinion of December 23, 1992, granting defendant's motion for summary judgment, and denying plaintiff's cross motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

David A. Lampen
Clerk of Court

By:

Deputy Clerk

January 6, 1993

NOTE: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF
MILITARY RECORDS

Application for Correction of Coast Guard Record of:	)	BCMR Docket No. 278-88
VIERRETHER, Stephen C. 499 56 5277, BMC	)	

FINAL DECISION

JOOST, Chairman:

This is a proceeding under the provisions of Title 10, United States Code, §1552. It was commenced on June 1, 1988, by the filing of an application for correction.

The applicant, a former chief boatswain's mate (BMC; pay grade E-7) asked the Board to invalidate his involuntary discharge from the Coast Guard and to restore him to active duty. He was discharged from the Coast Guard on June 1, 1988 and assigned an RE-4 (not eligible for reenlistment) code. He alleged that is was an error and an injustice for the Coast Guard to discharge him, after nearly 18 years of active duty, without a hearing before an administrative discharge board. He alleged that such a hearing is required by the Personnel Manual for all members with more than eight years of active duty. The applicant's commanding officer recommended that he be retained in the Coast Guard until the first retirement opportunity, but the Comman lant rejected this recommendation and directed his discharge

pursuant to a reduction-in-force program (RIF).

The Coast Guard submitted a memorandum from the Chief, Enlisted Personnel Division as its advisory opinion. According to the advisory opinion, the Coast Guard "strongly recommend[ed]" to the opinion, the applicant was identified for involuntary discharge under a program implemented by the Commandant on February 23, 1988. Commanding officers of all units were instructed by the Commandant to identify those enlisted members "not meeting stipulated performance criteria and/or with disciplinary problems.

The Coast Guard asserted that the provision of the Personnel Manual that required a hearing before an administrative discharge board for any members with eight or more years of active duty was only a "policy" and not "required by statute or law." "Like any policy, it can be changed by the Commandant." The Coast Guard also pointed out that members with 18 years of active duty who met the involuntary discharge program criteria were "allowed to remain on active duty until 20 years service for retirement. Unfortunately, [the applicant] was a few months short of 18 years . . . ."

The applicant's attorney took sharp issue with the Coast Guard assertion that the requirement for a hearing was more "policy" that had no binding force. "The Coast Guard cannot walk away from a published regulation."

HEARING

The applicant required an oral hearing before the Board. Upon review of the submissions, the Chairman denied the request on the ground that the written record provides sufficient information to form the basis for an informed decision. The applicant's attorney notified the

Board that he did not desire reconsideration of that denial.

FACTS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the applicant's submissions, the Coast Guard's response, the military record of the applicant, and applicable law.

1. The Board received the application within three years of the applicant's discovery of the alleged error or injustice, as required by Title 10, United States Code, §1552.

2. The applicant was first enlisted int he Coast Guard on June 29, 1970. He was honorably discharged, by reason of convenience of the Government, on June 2, 1988, after 17 years, 11 months, and 4 days active duty. He was not, prior to discharge, notified that he had a right to a hearing before a reenlistment board. AL-COAST 022/88, the authority for his discharge, provided in §5 thereof, that "The requirement for . . . is suspended, as is the requirement for an admin discharge board for members with 8 or more yrs of military service."

3. A Coast Guard regulation (Article 12-B-5, Personnel Manual) in effect at time the applicant was discharged, provided that a "members with 8 or more years of total . . . military service shall be notified, in writing, . . . That the members has the right to present the case and appear in person before a reenlistment board." That regulation was in effect at the time of promulgation of ALCOAST 022/88. It was not amended so as to repeal the right to a hearing for members subject to ALCOAST 022/88.

4. The Coast Guard, like every other agency of the Federal Government, is bound by its own regulations.

Service v. Dulles, 354 U.S. 363 (1957); *Casey v. United States*, 8 Cl. Ct. 234 (1985). The Commandant cannot change any or all of the Coast Guard's regulations at will; he certainly cannot change a regulation which vests important rights in senior personnel by an administrative message termed "HDQTRS TELECOMMUNICATIONS" which declares that an unspecified regulation is "suspended". The Coast Guard made no effort, aside from issuing this message, to change the regulation which guaranteed a hearing to a enlisted member with eight or more years service.

5. The Coast Guard erred in discharging the applicant without first holding a hearing, in violation of Article 12-B-5 of the Personnel Manual. Moreover, the Coast Guard committed an injustice in not granting the same rights to the applicant, who had served 17 years 11 months, and 3 days, as it granted to enlisted members who had served 18 years.

ORDER

The military record of former BMC Stephen C. Vierrether, 499 56 5277, USCG shall be corrected by setting aside the applicant's discharge and by directing that he be restored to active duty in the Coast Guard, with no break in service, within 50 days of the date of this order. The Coast Guard shall pay the applicant the amount due him as a result of this correction.

[SIGNATURES OF BCMR MEMBERS]

APPROVED: DATE: [UNDATED]

[UNSIGNED]
Rosalind A. Knapp
Deputy General Counsel
Delegate of the Secretary
Department of Transportation

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF
MILITARY RECORDS

Application for Correction of Coast Guard Record of	)	BCMR Docket No. 278-88
VIERRETHER, Stephen C. 499 56 5277, BMC	)	

FINAL DECISION

JOOST, Chairman:

This is a proceeding under the provisions of Title 10, United States Code, § 1552. It was commenced on June 1, 1988, by the filing of an application for correction.

The applicant, a former chief boatswain's mate (BMC; pay grade E-7) asked the Board to invalidate his involuntary discharge from the Coast Guard and to restore him to active duty. He also requested that certain performance evaluations and related entries in his service record be removed on grounds of bias and prejudice. His commanding officer had recommended that he be retained in the Coast Guard until the first retirement opportunity, but the Commandant rejected this recommendation and directed his discharge pursuant to a reduction-in-force (RIF) program. He was discharged from the Coast Guard on June 2, 1988 and assigned an RE-4 code (not eligible for reenlistment).

SUMMARY OF RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on June 29, 1970. During the next seventeen years, he was regularly promoted, eventually earning the rate of chief boatswain's mate. He saw nearly nine years of sea duty, earning numerous decorations and medals for conduct, polar service, and bravery.

In the winter of 1988, the Coast Guard, facing unexpected budgetary limitations, implemented an austerity program. This program consisted of deferred enlistments as well as a voluntary discharge option for enlisted personnel. However, in February 1988, the Commandant issued ALCOAST 022/88, which read:

> 1. The early release program . . . is not expected to fully achieve required personnel reduction goals. The following reduction in force (RIF) actions are therefore necessary:
>
> 2. Commanding officers/officers in charge are to identify enlisted members (including reserves on extended active duty) who meet any of the following criteria:
>
> > A. has a characteristic average of less than 3.0 for any factor using all marks assigned on two most recent performance evaluations prior to [the date and time] of this ALCOAST . . .
> >
> > B. is presently on performance probation . . .

> C. has, prior to this message, been awarded non-judicial punishment/convicted by a summary court martial two or more times in the preceding 12 months,
>
> D. has been convicted by a special or general court-martial within the preceding 24 months.
>
> 3. Units except those being closed/reduced on 1 Mar 88 . . . shall submit information required in paragraph 2 by message no later than 15 Mar 88. Units being closed/reduced on 1 Mar 88 shall submit the information required in paragraph 2 by message no later than 25 Feb 88 . . .
>
> 5. Those members Commandant directs to be discharged under this program will receive a Convenience of the Government Discharge in accordance with Article 12-B-12a(1) of [Personnel Manual]. For the purpose of this involuntary RIF program, the requirement for completion of a probationary period under Article 12-B-9 of [Personnel Manual] is suspended, as is the requirement for an administrative discharge board for members with 8 or more years of military service. . . .

The goal of this and similar ALCOASTs was apparently realized swiftly. ALCOAST 022/88 was rescinded in mid-May 1988.

An administrative message from Coast Guard Headquarters to the Cutter aboard which applicant was serving, dated April 1988 and marked "Routine," stated: "After a thorough review of [applicant's] service record by a panel of officers and enlisted personnel, Commandant has approved the discharge of [applicant] by reason of convenience of the government under Article 12-B-12a(1). Issue type discharge to which entitled (honorable or general) in accordance with Article 12-B-2. Assign Separation Code JCC and the appropriate reenlistment code. The basis for discharge is member has a characteristic average of less than 3.0 for at least one factor using all marks assigned on two most recent performance evaluations. Command shall make a page 7 entry . . . providing a brief explanation of the basis for the involuntary discharge."

On June 2, 1988, the applicant was honorably discharged, by reason of convenience of the Government, after 17 years, 11 months, and 4 days active duty.

In his application for correction, the applicant alleged that it was an error and an injustice for the Coast Guard to discharge him, after nearly 18 years of active duty, despite his commanding officer's recommendation to the contrary, without a hearing before an administrative discharge board. He alleged that such a hearing is required by both the Coast Guard Personnel Manual and the Administrative Investigations Manual for all members with more than eight years of active duty.

The Coast Guard submitted a memorandum from the Chief, Enlisted Personnel Division, as its advisory opinion. The Coast Guard "strongly recommend[ed] that the Board deny the applicant's request for relief." It stated that the applicant was identified for involuntary discharge under a program implemented by the Commandant on February 23, 1988. Commanding officers of

all units were instructed by the Commandant to identify those enlisted members "not meeting stipulated performance criteria and/or with disciplinary problems" for expedited separation.

The Coast Guard asserted that the provision of the Personnel Manual requiring a hearing before an administrative discharge board for any member with eight or more years of active duty was mere "policy" and not "required by statute or law." "Like any policy, it can be changed by the Commandant." The Coast Guard also pointed out that members with 18 years of active duty who met the involuntary discharge program criteria were "allowed to remain on active duty until 20 years service for retirement. Unfortunately, [the applicant] was a few months short of 18 years . . . ."

The applicant's attorney took sharp issue with the Coast Guard assertion that the requirement for a hearing was mere "policy" that had no binding force: "The Coast Guard cannot walk away from a published regulation."

HEARING

The applicant requested an oral hearing before the Board. The Chairman denied the request on the ground that the written record provides sufficient information to form the basis for an informed decision. The applicant's attorney notified the Board that he did not desire reconsideration of the denial.

FINDINGS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the applicant's submissions, the Coast Guard's response, the military

record of the applicant, and applicable law:

1. The Board received the application within three years of the applicant's discovery of the alleged error or injustice, as required by Title 10, United States Code, §1552.

2. At the time he was honorably discharged from the Coast Guard, applicant was less than four weeks short of having been a member of that Service for eighteen years.

3. On March 22, 1988, the Commanding Officer of the cutter on which the applicant was serving recommended to the Commandant that the applicant be considered for retention in service, as an exception to the Coast Guard-wide reductions.

4. The Administrative Investigations Manual of the Coast Guard (COMDTINST. M5380.1), by its terms, "establishes procedures for the appointment, conduct and review of administrative investigations." Investigation boards are defined as "fact-finding bodies which are necessary or desirable in administering the Coast Guard but which are not specifically authorized or required by other regulations . . ." It was issued in November 1987.

Section 6-L-1 lists those occasions when an Administrative Discharge Board must be convened:

> *General.* For the most part, enlisted personnel of the Coast Guard may not be separated from the Service with an other than honorable discharge unless they have been provided the opportunity to appear before an administrative discharge board. Similarly (with a few exceptions), enlisted personnel of the Coast Guard with more than 8 years total service may not be de-

> nied reenlistment, or be separated prior to the end of an enlistment, unless they have been provided the opportunity to appear before an administrative discharge board. Boards for this purpose are conducted largely in accordance with the rules for formal boards of investigation convened pursuant to this manual as modified by this section and article 12-B of the Personnel Manual, COMDTINST. M1000.6, particularly articles 12-B-5, 12-B-31, and 12-B-32. This section sets forth certain provisions unique to these boards (emphasis supplied).

5. Article 6-L-6 of the Administrative Investigations Manual provides:

> *Scope of Inquiry*. An administrative discharge board shall endeavor to develop fully the respondent's conduct, competency, background, character and attitudes, in order that the Commandant may make a fair determination as to retention or discharge. All pertinent testimony from superiors and shipmates, and all pertinent records bearing upon his desirability of retention shall be introduced. A respondent who chooses to testify shall be subject to full interrogation on all aspects bearing on the desirability of retention, subject only to paragraph 2-D-1.h.

6. The requirement of a discharge board for a member who has served at least eight years in the Coast Guard appears in two manuals: the Personnel Manual

and the Administrative Discharge Manual. The Commandant's directive, ALCOAST 022/88, did effectively rescind certain provisions of the Personnel Manual, as it expressly stated that involuntary discharges were to be issued under Article 12-B-12a(1) of that Manual. The Board agrees with Coast Guard's assertion that the Commandant may suspend the hearing requirements because an ALCOAST, a telegraphic "message-type" directive, may be issued only by Chief of Staff or above and is controlling over all other internal communications. HQINST M5402.3C. However, this ALCOAST did not reference and therefore did not rescind the requirement of a discharge board under the Administrative Investigations Manual, which was published shortly before the ALCOAST's transmission. The provision contained in the latter manual states that members with more than eight years of service may not be discharged without an administrative hearing, at which they have the right to appear by counsel and to present and cross-examine witnesses. This requirement was still in effect when applicant's involuntary discharge was executed. Article 6-L-1 expressly states that it may only be modified by provisions of the Personnel Manual. The Personnel Manual, while it may change the procedural routine of the boards set up by the Administrative Investigations Manual, can never wholly cancel them. The ALCOAST's attempt to do so was thus ineffectual.

7. The Coast Guard committed error by summarily discharging applicant without a hearing, in contravention of Article 6-L-1 of the Administrative Investigations Manual. ALCOAST 022/88 did not do away with these hearing rights which are saved to members who have served more than eight years. It expressly cancelled only Personnel Manual provisions, not those under the Investigations Manual.

The detailed safeguards and the openness of the proceedings inherent in an administrative discharge board were wrongfully denied this member, even though he was given an honorable discharge. This applicant who, under normal circumstances, would have known the composition of the panel reviewing he record, and would have been entitled to counsel, here was separated against his will without the benefit of these important safeguards, despite his immediate command's recommendation that he be retained.

8. The applicant has not established that the contested performance evaluations were the product of bias or discrimination.

ORDER

The military record of former BMC Stephen C. Vierrether, 499 56 5277, USCG shall be corrected by directing that his discharge be voided and his record show that he served continuously for twenty years, at which time he retired. The Coast Guard shall pay the applicant the amount due him as a result of this correction.

[SIGNATURES OF BCMR MEMBERS]

APPROVED: DATE: [UNDATED]

[UNSIGNED]
Rosalind A. Knapp
Deputy General Counsel
Delegate of the Secretary
Department of Transportation

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF
MILITARY RECORDS

Application for Correction of Coast Guard Record of:	)	BCMR Docket No. 278-88
VIERRETHER, STEPHEN C. 499 56 5277, BMC	)	Decision of the Deputy General Counsel

This case involves the validity of a 1988 Coast Guard reduction-in-force (RIF) program, as it applied to a member who had almost 18 years of active duty service before his RIF became effective. On February 23, 1988, the Commandant implemented an involuntary discharge program for enlisted personnel, to achieve personnel reduction goals due to severe cuts in the Coast Guard's 1988 budget.[1] Pursuant to ALCOAST 022/88, the Commandant directed commanding officers to identify those enlisted members not meeting stipulated performance criteria or those with disciplinary problems, for a convenience of the Government separation, under section 12-

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[1] The Commandant has general authority over Coast Guard personnel. *See, e.g.*, 14 U.S.C. § 632, vesting him with the power to:

> " . . . issue rules, orders, and instructions, not inconsistent with law, relating to the organization, internal administration, and personnel of the Coast Guard."

B-12 a.(1) of the Personnel Manual. This section permits the Commandant to authorize or direct the separation of enlisted personnel for the convenience of the Government by means of:

> General demobilization, reduction in authorized strength or by an order applicable to all members of a class of personnel specified in the order. (*Id.*)

ALCOAST 022/88 applied to the class of members not meeting certain performance criteria or who had exhibited certain disciplinary problems, and thus instituted a valid RIF program within the meaning of the Personnel Manual provisions.

The Board for Correction of Military Records found the RIF not applicable to former chief Boatswain Mate (BMC) Vierrether, as the procedures applied to him did not afford him the right to appear before an administrative discharge board, a right the Board believed to apply under the Coast Guard Administrative Investigations Manual (Administrative Manual). The Board accordingly would correct the applicant's record to void his discharge and to show that he served continuously for 20 years, thus being eligible for retirement benefits.[2]

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[2] The applicant also complained that certain of his performance evaluations and related "page 7 entries" contained marks and comments that should be discounted as aberrational and as products of bias or discrimination. The Coast Guard's August 31, 1988 advisory opinion stated that the marks were low due to the applicant's poor performance during the reporting period in question. The Board found that the applicant did not

I adopt the Board's Summary of Record and Submissions, but I do not concur in the Board's conclusion that the Coast Guard erred in discharging former BMC Vierrether without a hearing, or in this Board's action to correct the applicant's record and void his discharge. I find the absence of an administrative discharge board hearing in these circumstances did not constitute an error or an injustice.

The applicant had argued that the ALCOAST Notice 022/88 could not, by itself, amend the Personnel Manual so as to suspend an enlisted member's right to a hearing before an administrative discharge board. The Coast Guard disagreed, referring to statutory and regulatory authority giving the Commandant the power to modify or rescind the provisions of the Personnel Manual relating to discharge of regular enlisted members. The Board correctly agreed with the Coast Guard and found that ALCOAST 022/88 effectively suspended the right to a hearing before an administrative discharge board by a member with over 8 years of service and facing separation prior to the end of his or her enlistment. This right is otherwise contained in Article 12-B-5, of the Coast Guard Personnel Manual. (*See also* Board Decision at 5, ¶ 6).

The Commandant's authority to issue, modify and rescind regulations regarding Coast Guard functions derives from his general statutory powers (14 U.S.C. §§ 93 and 632) as well as from those delegated to him by the Secretary of Transportation. (14 U.S.C. §§ 531 and 633; 33 C.F.R. §1.05-1). His authority specifically to

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establish that the contested performance evaluations were the products of bias or discrimination. (Finding #8). I concur with this finding.

terminate contracts of regular enlisted members is provided in 10 U.S.C. § 1169, under delegation from the Secretary. Pursuant to this delegation, the Commandant had promulgated Chapter 12-B of the Personnel Manual, prescribing procedures for discharging enlisted members. ALCOAST 022/88, published pursuant to internal guidelines, legitimately suspended the application of Article 12-B-5 and the function of the administrative discharge boards for members with eight or more years of military service.

Accordingly, although Article 12-B-5 of the Personnel Manual generally gives members with eight or more years of service, who are about to be separated prior to the end of their enlistments, the right to an administrative discharge board proceeding, the Commandant could and did suspend this policy by ALCOAST 022/88.

I disagree with the Board's reliance on the *Administrative* Manual as a basis for relief. The Board found that this manual provides an independent right to a member with more than eight years of services of an administrative discharge board proceeding in the event of separation prior to the end of his or her enlistment. (Section 6-L-1, COMDTINST M5380.1 series.) The Board went on to find that ALCOAST 022/88 did not reference this manual and thus the Commandant did not effectively suspend its provisions.

The Administrative Manual creates no independent right on the part of a Coast Guard member for such a hearing. The obvious purpose of the language relied upon by the Board (in Section 6-L-1) is to briefly describe rights to hearings afforded under *other* authority. Moreover, the Administrative Manual implements, and is subsidiary to, the Personnel Manual, describing its functions as a "general guide for investigations." In the

event of a conflict between the other regulations and those contained in this manual, the other regulations would govern. (*See* the November 6, 1987 transmittal by the Coast Guard Chief of Staff, distributing COMDTINST M5830.1, the Administrative Investigations Manual, at ¶1. and ¶3.a.)

In fact, Section 6-L-1 of the Administrative Manual (relied on by the Board) reinforces this conclusion. It is prefaced by the permissive phrase, "for the most part," and it plainly recognizes "exceptions" to the opportunity for administrative discharge board proceedings. More importantly, this portion of the manual recognizes that the boards of investigation must conform to the provisions of Article 12-B of the Personnel Manual. Section 6-L-1 states, in pertinent part:

> . . . [Administrative discharge] [b]oards . . . are conducted largely in accordance with the rules for formal boards of investigation convened pursuant to this manual *as modified by* this section and *article 12-B of the Personnel Manual, COMDTINST M1000.6* . . .

(Administrative Manual, section 6-L-1, emphasis supplied).

In this case, ALCOAST 022/88 suspended the right to an administrative discharge board contained in the Personnel Manual, Article 12-B-5. Procedures for such boards, contained in the Administrative Manual, are subject to the provisions in Article 12-B of the Personnel Manual. Given that the Personnel Manual clearly governs, the guidelines contained in the Administrative Manual must fall.

Even assuming *arguendo* that the Administrative Manual does present an independent right to a hearing on the part of a Coast Guard member with over eight years of service, I find the Commandant effectively suspended this right by explicitly referring to "the requirement for administrative discharge boards for members with 8 or more years of military service: in the ALCOAST 022/88. His intent was clear; the fact that section 6-L-1 was not specifically referenced, if error at all, was harmless error.

In terms of procedural fairness to the applicant, it must be remembered that a service member does not have a right to remain in the military service until the end of his or her enlistment. *Giglio v. United States*, 17 Cl. Ct. 160 (1989), citing *Keef v. United States*, 185 Cl. Ct. 454 (1968). Additionally, "[m]ere expectations to remain on active duty so as to achieve a military retirement, is not the stuff that due process rights are directed at." (*Id.*) A discharge under honorable conditions carries no stigma and may be accomplished administratively. (*Id.*; *see also*, *Jones v. United States*, 7 Cl. Ct. 673 (1985). I find no injustice in the RIF program at issue as it was directed towards former BMC Vierrether.

Accordingly, I deny relief.

Date: April 18, 1991

/s/
Rosalind A. Knapp
Deputy General Counsel
Department of Transportation
as designated by the Secretary

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, DC 20515-6230

May 30, 1990

Docket 46911
Documentary Services Division, C-55
U.S. Department of Transportation
Room 4107
400 Seventh Street, S.W.
Washington, D.C. 20590

Gentlemen:

As Chairman and Ranking Minority Member of the House Merchant Marine and Fisheries Committee, we are writing to comment on proposed regulations concerning the Board for the Correction of Military Records (BCMR) of the Coast Guard, published on April 30, 1990 (*Federal Register*, Volume 55, Number 83, pages 18001-18005). These regulations implement section 212 of the Coast Guard Authorization Act of 1989, Public Law 101-225.

While we are pleased that the proposed regulations were published in such a timely manner, we are very disappointed with their content. Specifically, the definition of a "complete application" is directly contrary to Congressional intent. The proposed regulations state that a "complete application" consists of: (1) the application and any supporting evidence; (2) the applicant's military record: (3) any relevant medical records; (4) the written views of the Coast Guard; (5) the applicant's

rebuttal of the Coast Guard's views: and (6) any hearing. As the authors of section 212 of the Coast Guard Authorization Act of 1989, it was not our intent to include the Coast Guard's views, the applicant's rebuttal, and the hearing in the requirements for a complete application. In fact, the section-by-section analysis for the Coast Guard Authorization Act of 1989 that appeared on page H-9311 of the November 21, 1989, *Congressional Record* clearly provides:

> ". . . This section requires that an application for relief be complete before the ten-month time period begins. An application is complete when the military records of the applicant and any applicable Veterans Administration medical records have been received by the BCMR. This requirement should not be used by the BCMR to unreasonably extend the 10-month time period. For example, the time period necessary to complete a hearing, including oral argument, is included in the 10-month period."

We first became aware of the problems with the BCMR when a group of past and present Coast Guard personnel sued the BCMR over delays in processing applications for relief. It is our understanding that delays in obtaining Coast Guard comments and in completing hearings due to an inadequate number of BCMR staff are the two main reasons that applications to the BCMR for relief are processed so slowly. The inclusion of Coast Guard comments and the hearing in the requirements of a "complete application" will render a ten-month limitation for reaching a final decision on an application meaningless.

Please amend the proposed regulations to conform to the Congressional intent of section 212 of the Coast Guard Authorization Act of 1989.

With kind regards, we are

Sincerely,

WALTER B. JONES
Chairman

ROBERT W. DAVIS
Ranking Minority Member

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 93-982

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN C. VIERRETHER, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF VIETNAM VETERANS OF AMERICA IN SUPPORT OF PETITIONER

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JANUARY 1994

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Interest of the *Amicus*

Vietnam Veterans of America ("VVA") is a nonprofit national veterans service organization chartered by Congress. Its membership is composed of over 40,000 veterans of the Vietnam era in more than 500 chapters. Vietnam-era veterans, including some of VVA's members, are on active duty in the armed forces today. In 1985, VVA instructed its Legal Services Program to intervene in cases where civil liberties issues affecting active duty personnel are at issue.[1]

[1] Consents to the filing of this brief have been lodged with the Clerk.

Chief Vierrether's petition should be granted. As the military services opt to trim budgets by reducing payroll, it becomes increasingly important for the judiciary to ensure that those who are honorably discharged for the "convenience of the government" are not unfairly harmed in the process.

Argument

A "CONVENIENCE OF THE GOVERNMENT" DISCHARGE WITH AN RE-4 REENLISTMENT CODE IS STIGMATIZING, ESPECIALLY WHEN ISSUED TO A CAREER SERVICEMEMBER

A military discharge is not the same thing as a "pink slip" from a civilian employer. Time spent by an individual in the service of the country, as a member of one of the armed services, is inherently different from time spent in any other vocation. Like the familiar Scholastic Aptitude Test which gives colleges and universities a numerical score to aid in evaluating students from diverse backgrounds, the circumstances of a military discharge provide standardized information which is routinely used for a variety of civilian purposes nationwide. As a result, questions about military service and the circumstances of one's separation therefrom are a routine part of employment decisions not only for civil service jobs but for innumerable positions in the private sector as well. And the use of codes or other abbreviations will not preclude the message from being conveyed. *See Casey v. United States*, 8 Cl. Ct. 234, 242-43 (1985) (even information "for official use only" is known and understood by "the part of society that counts—*i.e.*, prospective employers"). If a particular job is even remotely defense-related or involves any kind of a security clearance, as many do, attention to prior military service could be, and often is, determinative. There is no known civil record of

comparable scope and importance. A military discharge lasts a lifetime. In this day and age, it is virtually impossible to avoid the repercussions of a stigmatizing discharge.

The importance of information about a discharge is at least partially attributable to the fact that military service is something a large segment of the population can identify with. Millions of Americans have served in uniform. They know from first-hand experience what things *really* mean—regardless of what they happen to be called. That substantial segment of the community at large knows, for example, that an Army, Air Force or Marine Corps officer would be a Second Lieutenant first, and a First Lieutenant second.

Another thing they all know is that individuals who are discharged "for the convenience of the government" were discharged under unusual circumstances of some kind. Such a discharge indicates that the normal reasons for a discharge—end of enlistment, retirement, medical condition—did not apply. Rather, the action was for the government's "convenience," This, in itself, puts the veteran under a cloud, as it is likely to cause a prospective employer to want to know more.

But when the uncertainty of a "convenience of the government" discharge is combined with an RE-4 reenlistment code,[2] a definite red flag is raised. The message *now* being conveyed by the military is, "We are discharging you for our convenience, AND WE DON'T *EVER* WANT YOU BACK." What began as a cloud has now blossomed into a thunderhead. The recipient of this further information knows not only that there was something unusual about

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[2] An RE-4 code is the worst of all because it declares the veteran ineligible to reenter military service of any kind in any capacity. It is often referred to as a "bar to reenlistment." An RE-1 code, which is the best of the lot, indicates that the veteran is eligible to reenlist. Between those are RE-2 and RE-3. They involve less stringent bars.

the circumstances of the discharge but also that those circumstances were such that further service by that individual was out of the question.

When the foregoing information pertains to someone within two years of qualifying for retirement, like the petitioner here, the situation rises to the level of a maelstrom. An 18-year veteran being sent home and told never to come back suffers stigmatizing damage to his reputation from which he or she may never recover. Employers and other members of the community are bound to wonder why someone who had served honorably for nearly 18 years wasn't welcome back for two more. This is what "stigma" is all about.

There are substantial tangible, economic consequences to the discharge this petitioner received, as well. His immediate employment was terminated by the "convenience" discharge. But his prospects for *future* employment were adversely affected by the RE-4 code, even beyond the fact that private sector employers look unfavorably upon this information. While the Coast Guard imposed the RE-4, the other military services honor it as faithfully as their own. They bar him. The Coast Guard has thus "foreclosed his freedom to take advantage of *other* employment opportunities." *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (emphasis added). This it could not do without at least affording him a hearing.

Lastly, there is the fact that this petitioner has been deprived of nearly 18 years of equity in his retirement—a retirement he will *never* be able to earn since neither the Coast Guard nor the other military services will permit him to serve the short time he needs in order to qualify.

GIs suffer both stigmatizing damage to their reputations and tangible interference with their ability to make a living when they are discharged for the convenience of the government and issued disqualifying reenlistment codes. The stigma and interference only become worse when the

individual, like petitioner, had had a long career and was fast approaching retirement eligibility. The loyal members of our armed services deserve, and Due Process demands, the opportunity for a personal hearing—prior to such damage being inflicted.[3]

Conclusion

For the foregoing reasons, and in light of the importance of the issues presented, Chief Vierrether's petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1994

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[3] The Court of Federal Claims erroneously suggested that petitioner's appeal to the BCMR may have been sufficient, as a post-discharge hearing, to satisfy the demands of due process. Pet. App. 21a n.5. In actuality, the vast majority of cases are decided by the various BCMRs without a hearing. This is especially true of the Coast Guard BCMR, which for all practical purposes has gone out of the business of conducting hearings. The board denied Chief Vierrether's request for a hearing, *id.* 28a, 36a, and his appeal, like that of the overwhelming majority of others, was resolved on the basis of the written record alone. He has never had the opportunity to appear in person before any forum to address the matters which have had such a devastating impact on both his past career and his future livelihood.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 212 of the Coast Guard Authorization Act of 1989, 10 U.S.C. 1552 note (Supp. IV 1992), applies to petitions pending before the Coast Guard Board for the Correction of Military Records (BCMR) at the time the statute was enacted.

2. Assuming the statute applies to such petitions, whether the recommended draft decision by the BCMR can be considered "final" without the legally mandated review by the Secretary or the Secretary's designee.

3. Whether the Commandant of the Coast Guard possesses authority to modify his own directives with regard to the right to a hearing.

4. Whether the denial of a hearing violated petitioner's due process rights.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is unpublished but the decision is noted at 6 F.3d 786 (Table). The opinion of the Court of Federal Claims (Pet. App. 5a-25a) is reported at 27 Ct. Cl. 357 (1992).

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1993. A petition for rehearing was denied October 14, 1993. Pet. App. 3a-4a. The petition for a writ of certiorari was filed on December 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In December, 1987, Congress enacted the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. This law severely restricted appropriations for federal agencies in order to reduce the sizable budget deficit. To ensure that the Coast Guard's actual expenditures did not exceed its curtailed funding level, the Coast Guard attempted to reduce its manpower by instituting a voluntary early-out program. This effort failed to achieve the necessary reductions in personnel, and the Coast Guard was forced to implement an involuntary discharge program, or Reduction in Force (RIF). Pet. App. 6a-7a.

On February 23, 1988, the Coast Guard Commandant issued ALCOAST 22/88, establishing an involuntary discharge program. Pursuant to the terms of ALCOAST 22/88, all persons within an identified class were eligible for discharge at the "convenience of the government." The order suspended the opportunity for a hearing before an administrative discharge board for those individuals discharged pursuant to the involuntary discharge program. Absent the suspension effected by the ALCOAST, members of the Coast Guard with at least eight years of service would have been entitled to a pre-discharge hearing before an administrative discharge board. Pet. App. 7a-8a. In April, 1988, a Coast Guard panel approved petitioner's discharge under ALCOAST 22/88. Pet. App. 35a.

Pursuant to a separate order, ALCOAST 25/88, Coast Guard personnel who were scheduled for discharge in accordance with ALCOAST 22/88, but

who had completed 18 years of service, could be retained in the Coast Guard to complete 20 years of service, after which time they would be required to retire. At the time ALCOAST 25/88 was issued, petitioner was roughly three months short of having served for 18 years. Following the decision to discharge him, petitioner sought a waiver of the 18-year rule so that he could qualify for retirement. The Coast Guard denied this request, and petitioner was honorably discharged on June 2, 1988, with a reenlistment eligibility classification code of "RE-4" (precluding reenlistment). Pet. App. 8a-9a.

On June 3, 1988, petitioner petitioned the Coast Guard's Board for the Correction of Military Records (BCMR) seeking to invalidate his discharge. He alleged, *inter alia*, that it was unlawful to suspend the right to a hearing before an administrative discharge board prior to discharge, in part because the Due Process Clause gave him a right to such a hearing. Pet. App. 9a.

In May, 1990, the BCMR referred a preliminary draft decision to the Deputy General Counsel of the U.S. Department of Transportation for review and final action. Pet. App. 32a-40a; see 33 C.F.R. 52.64(b). The draft concluded that, by issuing ALCOAST 22/88, the Commandant had expressly rescinded the requirement for a hearing before an administrative discharge board contained in the Coast Guard Personnel Manual. Pet. App. 39a. However, the BCMR also concluded that an independent opportunity for a hearing before an administrative discharge board was provided elsewhere in the Coast Guard Administrative Investigations Manual (AIM), and that, because the Commandant's order had not specifically refer-

enced the AIM, the AIM provisions had not been affected by ALCOAST 22/88. Pet. App. 39a. This draft accordingly recommended that petitioner's discharge be declared void based upon the lack of an AIM hearing, that his records be corrected to show 20 years of service, and that he be paid all amounts due as a result. *Id.* at 40a.

After considering the BCMR's recommended draft decision, the Deputy General Counsel, as the Secretary's designee, released a final decision on April 18, 1991. Pet. App. 41a-46a. This decision adopted the BCMR's factual summary of the record, but disagreed with the draft decision's legal conclusions and denied petitioner any relief. *Ibid.* The Deputy General Counsel concluded that the Commandant's order had effectively suspended any and all opportunities for a hearing before an administrative discharge board prior to petitioner's discharge. *Ibid.* The Deputy General Counsel disagreed with the BCMR's preliminary conclusion concerning whether a separate opportunity for a hearing was created under the AIM, and concluded instead that the AIM created no independent opportunity for a hearing apart from the right provided in the Coast Guard Personnel Manual and that, even if it did, ALCOAST 22/88 would have suspended that right to a hearing as well. See *id.* at 46a-47a.

Petitioner filed suit in the Court of Federal Claims. He asserted, in pertinent part, that the Coast Guard had wrongly denied him an administrative hearing contemplated by the regulations and that due process required that he receive a hearing prior to discharge. He also argued that Section 212 of the Coast Guard Authorization Act of 1989, 10 U.S.C. 1552 note (Supp.

IV 1992), created a statutory deadline for the Secretary to take final action on petitions filed with the BCMR and that this statutory deadline applied to his petition, which was already filed when the statute became effective. He asserted that the recommended draft decision of the Board became the agency's final decision because the Secretary lost authority to act following expiration of this new deadline.

On cross-motions for summary judgment, the Court of Federal Claims granted the government's motion. Pet. App. 5a-25a. The court agreed with the BCMR and the Secretary that the Commandant had the power to suspend the right to a pre-discharge hearing under the Personnel Manual and the AIM (*id.* at 17a), and that, since an RE-4 reenlistment code is not stigmatizing, there was no right to an administrative hearing under the Due Process Clause (*id.* at 19a-23a). Because petitioner's BCMR application was filed before passage of Section 212, the court also held that that Section—which requires the Secretary to impose a ten-month deadline for final action on BCMR petitions—did not apply. *Id.* at 23a-24a. The court therefore did not reach the issue of whether Section 212 had the effect urged by petitioner, that is, of transforming a recommended decision into final agency action upon expiration of the ten-month period. The court dismissed the complaint.

On appeal, the court of appeals affirmed without opinion. Pet. App. 1a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or

any other court of appeals. Further review is therefore not warranted.

1. Petitioner argues (Pet. 11-15) that Section 212 of the Coast Guard Authorization Act of 1989, 10 U.S.C. 1552 note (Supp. IV 1992), created a ten-month statutory deadline for the Secretary to take final action on petitions filed with the BCMR and that this statutory deadline applied to his petition filed with the BCMR before the statute went into effect. The Court of Federal Claims declined to apply Section 212 to petitioner's BCMR petition. The court ruled that Section 212 was inapplicable because Congress had indicated no intent to affect then-pending applications when Section 212 was passed. Pet. App. 24a.

Petitioner argues that Section 212 is procedural or remedial in character, and thus should apply to cases pending before the BCMR when the statute became effective. Petitioner asserts that the decision below on this issue conflicts with *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), and that the petition should be held pending *Landgraf* v. *USI Film Products*, No. 92-757, and *Rivers* v. *Roadway Express, Inc.*, No. 92-938.

Under the test articulated by the government in its amicus filing in *Landgraf*, Section 212 is a procedural statute. By its terms, it requires only that the Secretary take the procedural step of amending his regulations to provide that final action is taken on BCMR petitions within ten months.[1] Under the view asserted by the government in *Landgraf*, Section 212 should therefore apply to pending cases. However,

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[1] The regulations now require final action within ten months. 33 C.F.R. 52.2(a), 52.68.

this petition need not be held pending *Landgraf*. As discussed below, applying Section 212's ten-month rule to petitioner's pending BCMR petition does not give him the relief he seeks. Rather, it gives him at best the right to a final decision, which in this case he received six days after the deadline.

2. Petitioner argues (Pet. 16-20) that because the Secretary's final decision was issued six days after the end of the ten-month period, the recommended decision of the BCMR,[2] and not the actual final decision, must be deemed the agency's "final action." As an initial matter, and as petitioner acknowledges (Pet. 20), the courts below did not reach this issue. Review of this issue by this Court would accordingly be unwarranted.

In any event, and contrary to petitioner's assertion (Pet. 10), the issuance of a final decision after the end of the ten-month period is not contrary to *Brock* v. *Pierce County*, 476 U.S. 253 (1986). Although Section

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[2] The Coast Guard's regulations have long reserved to the Secretary's delegate the authority to issue the final decision in cases such as this one, while delegating to the BCMR responsibility only for recommending a decision. 33 C.F.R. 52.64(b); see also *Miller* v. *Lehman*, 801 F.2d 492, 497 (D.C. Cir. 1986) (Congress directed the Secretary to make the final decision). The Court of Federal Claims accurately noted that even the BCMR senior staff considers these decisions only "recommended." Pet. App. 24a. Only upon the Deputy General Counsel's signature can a recommended decision become final. Indeed, where, as here, a recommended decision is not approved by the Deputy General Counsel, it remains a nullity; it is only a decision ultimately issued by the Deputy General Counsel that becomes final agency action. Until that point, draft decisions remain no more than internal recommendations to the agency decision maker.

212 sets a deadline for agency action, Congress failed to stipulate a consequence for the agency's failure to meet that deadline. *Brock* recognizes that, without a congressionally mandated consequence, the agency does not necessarily lose the power to act beyond the ten-month deadline. 476 U.S. at 261-262. In fact, *Brock* permitted agency action to exceed a statutorily mandated deadline. *Id.* at 266. Petitioner asks this Court to disregard *Brock* and hold, in the absence of any expressed legislative intent, (1) that the agency's final decisionmaker lacked legal authority to act in this case, and (2) that, as a result of the mere passage of time during the review process, an internally recommended decision became a legally binding final decision. Neither appellate precedent nor logic supports these arguments.[3]

By enacting Section 212, Congress unmistakably sought to accelerate the overall pace of the BCMR's decisionmaking. However, no evidence exists, in either the statute or its legislative history, of congressional intent to prescribe any particular consequence for untimely action. Congress has in some contexts provided that recommended decisions within the Department of Transportation become final

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[3] As petitioner notes (Pet. 11), one district court judge recently ruled that an initial BCMR-recommended decision should be deemed final when the BCMR changed its recommendation after the ten-month deadline, and another district court judge has reached the same result. *Gazlay* v. *Busey*, 819 F. Supp. 29 (D.D.C. 1993); *Gottlieb* v. *Pena*, Civ. No. 92-1667-TPJ (D.D.C. Apr. 26, 1993). Appeals are pending in both of those cases. *Gazlay* v. *Busey*, No. 93-5183 (D.C. Cir.) (appeal pending); *Gottlieb* v. *Pena*, No. 93-5182 (D.C. Cir.) (appeal pending).

agency action when a statutory time period is not met. See 49 U.S.C. App. 1371(c)(2). In fact, in its last session Congress considered legislation that would have prescribed that result in BCMR proceedings. See H.R. 2150, 103d Cong., 1st Sess., § 204 (1993). In its final version, however, the Coast Guard Authorization Act of 1993, Pub. L. No. 103-206, 107 Stat. 2419, did not include such a provision.

Here the Secretary acted within six days of the end of the ten-month period. This case does not present an instance, like that in *Brock*, where the agency's *initial* attempt to take adverse action with regard to a party occurs after a deadline has passed. See *Brock*, 476 U.S. at 256-257 (only after 120-day statutory deadline had passed did Department of Labor take final action denying an allowance for certain costs incurred by a CETA program run by a county in the State of Washington). In contrast, here petitioner has already been discharged; petitioner sought *correction* from the BCMR and the Secretary. It is not in the general interest of those seeking such corrections to argue that a failure on the part of the BCMR or the Secretary to act within ten months removes the agency's ability to give relief. Nor is there statutory authority to elevate to "final" status a BCMR recommendation that the Secretary has not approved.

3. Petitioner argues (Pet. 20-22) that the Commandant was without authority in connection with the RIF program to modify his directives with respect to the right to a pre-discharge administrative hearing. However, even the BCMR decision that petitioner seeks to render "final" held that the Commandant possesses this authority, and that decision was upheld by the Secretary and the courts below.

That decision was correct. Congress has provided full authority to the Commandant to "issue rules, orders, and instructions, not inconsistent with law, relating to the organization, internal administration, and personnel of the Coast Guard." 14 U.S.C. 632.[4] The judiciary uniformly accords substantial deference to both the substance and procedure of military personnel decisions. *Giglio* v. *United States*, 17 Cl. Ct. 160, 170 (1989); *Taylor* v. *United States*, 22 Cl. Ct. 335, 339 (1991); *Pifer* v. *Laird*, 328 F. Supp. 649, 652 (N.D. Cal. 1971). The change here fell well within the Commandant's authority. Further, it occurred with respect to an entire class of actions—those taken in connection with the RIF—and was not an instance of an agency ignoring a regulation's application during one individual's adjudication.

4. Petitioner's discharge does not cast a stigma upon his service and does not contain derogatory connotations. The indicia of petitioner's removal include an honorable discharge, a code barring reenlistment, and the stated reason for separation given as a reduction in military strength. These factors are neutral and not derogatory. They merely indicate that petitioner was discharged as part of a general demobilization. Pet. App. 20a. The Constitution does not

[4] In fact, applicable statutes do not even require that military personnel receive advance notice of changes to internal personnel rules, such as those contained in the Coast Guard Personnel Manual and the Administrative Investigations Manual. 5 U.S.C. 552(b)(2); 44 U.S.C. 1505(a). See *Pifer* v. *Laird*, 328 F. Supp. 649, 652 (N.D. Cal. 1971); *Doe* v. *Ball*, 725 F. Supp. 1210, 1215-1216 (N.D. Fla. 1989), aff'd *sub nom. Doe* v. *Garrett*, 903 F.2d 1455, 1458-1464 (11th Cir. 1990), cert. denied, 499 U.S. 904 (1991).

provide petitioner with a due process right to a hearing in these circumstances.

Petitioner cites no case law holding that the Due Process Clause requires a hearing in connection with an RE-4 reenlistment code or that such a code is stigmatizing. On the contrary, precedent establishes that reenlistment bars are not *per se* stigmatizing and that involuntary discharges must indicate "derogatory" reasons before a hearing is required. *Keef* v. *United States*, 185 Ct. Cl. 454, 467 (1968). Here, the Court of Federal Claims properly concluded that petitioner's reenlistment code of RE-4 (denying reenlistment) and separation code denoting the reason for discharge as a general demobilization neither stigmatized him nor reflected anything derogatory about him. Pet. App. 20a.

Petitioner further asserts that his length of service necessarily creates a derogatory connotation in combination with the neutral wording of his discharge record. Pet. 25. Courts have consistently refused, however, to be swayed by the length of a litigant's service in applying principles of law concerning the propriety of discharges without hearings. Nor does longevity alone justify the imposition of a hearing requirement. *Giglio*, 17 Cl. Ct. at 169-170; *Keef*, 185 Ct. Cl. at 467-468.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-982

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN C. VIERRETHER, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Argument

1. Having successfully argued to the Court of Appeals that § 212 of the Coast Guard Authorization Act of 1989 does not apply to Chief Vierrether's case, the government now concedes that it does. Opp. 6. Yet it maintains that he is still entitled to no relief because § 212 does not deprive the Secretary of Transportation of the power to set aside decisions of the Board for Correction of Military Records ("BCMR") even after the statutory 10-month period for final agency action has expired. There are three basic errors in this position.

First, it rests on the mistaken notion that action by the Secretary is required by the record-correction statute, 10 U.S.C. § 1552 (Supp. IV 1992), and that therefore

decisions of the BCMR lack finality unless acted upon by the Secretary. Opp. 7 n.2, 9. The statute simply does not so provide. All § 1552(a)(1) requires is that the Secretary "act[] through boards of civilians."[1] Here, such a board *twice* functioned on the case.[2] Any further review within the Department of Transportation ("DOT") is entirely voluntary on the Secretary's part. It is not required by any Act of Congress and is not otherwise integral to the correction board process, as DOT's own conduct shows.

Thus, the vast majority of cases are not even subject to departmental review following the decision of the BCMR. Pet. 7. This includes cases that involve issues just like those presented by Chief Vierrether's application. If the BCMR had ruled *against* him, rather than *for* him, 33 C.F.R. § 52.64(a)(1) (1993), or if the Coast Guard had recommended the same or substantially the same relief as that which he

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[1] The government cites *Miller v. Lehman*, 801 F.2d 492, 497 (D.C. Cir. 1982), for the proposition that "Congress directed the Secretary to make the final decision." Opp. 7 n.2. *Miller* does not so hold. At issue was whether the Secretary of the Navy was bound by findings of the Board for Correction of Naval Records ("BCNR") unless they were unsupported by substantial evidence, not whether the BCNR's decision could be final without review by the Secretary. 801 F.2d at 497. The BCNR's regulations, like those of the Coast Guard BCMR, 33 C.F.R. § 52.64 (1993), provide for final agency action without secretarial review in many cases. 32 C.F.R. § 723.6(e) (1993); *see also id.* § 865.18(e) (Air Force).

[2] The government refers to "a preliminary draft decision" as having been referred by the BCMR to the Deputy General Counsel in May 1990. Opp. 3. There were two BCMR decisions, Pet. 8, each headed "Final Decision." Pet. App. 27a, 32a. Refusing even to acknowledge the existence of the first (even though it is in the record), the government claims that the second was handed down in May 1990. This seems doubtful not only because the BCMR was still requesting information from Chief Vierrether's counsel as late as July 20, 1990, but also because the government has represented that it is unable to determine the date of the second decision. Pet. 8-9. A copy of the Justice Department's letter to this effect has been lodged with the Clerk.

requested, *id.* § 52.64(a)(3), there would have been no further review within DOT. The Court need not address the lawfulness of a regulatory scheme which attempts to impose additional layers of review if a citizen wins, but not if he or she loses. The mere fact that, under the regulations, a *denial* of relief in this case would have received no post-BCMR departmental review demonstrates both that such review is not statutorily required and that nothing inherent in the issues dictates such review.

Beyond this, if, as the government claims, there is no "statutory authority to elevate to 'final' status a BCMR recommendation that the Secretary has not approved," Opp. 9, not one of the hundreds upon hundreds of BCMR cases which have received no secretarial review since § 212 took effect would be final even now. Pet. 7. This would mean that the number of cases in which the 10-month rule has been violated would be orders of magnitude greater than we feared. It would also mean that secretarial review was required in the thousands of cases that have been decided by the *other* BCMRs without such review. *See* note 1 *supra*. To accept the government's attempt to finesse the § 212 violation in Chief Vierrether's case would thus open a Pandora's box of issues in a host of other cases.

Because no Act of Congress mandates secretarial review, treating § 212 as mandatory, as the only judges to have reached the question to date have correctly done, violates no competing statutory requirement.

Second, contrary to the government's view, Opp. 9, no inference can be drawn from the fact that Congress failed to include in the Coast Guard Authorization Act of 1993, Pub. L. No. 103-206, 107 Stat. 2419 ("the 1993 Act"), a provision that would have confirmed that § 212 has the effect attributed to it by *Gazlay v. Busey*, 819 F. Supp. 29 (D.D.C. 1993), *appeal pending sub nom. Gottlieb v. Peña*, No. 93-5183 (D.C. Cir.), and *Gottlieb v. Peña*, Civil No. 92-1667 (D.D.C. Apr. 26, 1993), *appeal pending*, No. 93-5182

(D.C. Cir.).[3] As Justice Scalia explain[illegible] in dissent in *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987), there is typically a range of plausible explanations for what Congress does *not* do, including "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter that status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." His skepticism about inferences from legislative

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[3] Nor is it probative that Congress has provided *in haec verba* that some other type of agency action under an entirely unrelated statutory scheme (the Airline Deregulation Act of 1978) becomes final when a statutory deadline is not met. Opp. 8-9. Whether an agency loses the power to overturn a ruling in a private party's favor when it fails to exercise that power within a statutorily-prescribed period for final agency action requires the kind of statute-specific analysis undertaken by Judge Greene in *Gazlay*. *See* Pet. 16-20. As a result, the government's victory in *Brock v. Pierce County*, 476 U.S. 253 (1986), hardly means that it is entitled to prevail here. The fact that the agency process at issue involves the correction of some earlier adverse action, *see* Opp. 9, is immaterial. Section 212 applies to the *BCMR* process, and not to the Coast Guard's administrative discharge process. Hence, the government's effort to contrast this case with *Pierce County* is unavailing. It also claims that "[i]t is not in the general interest of those seeking [record] corrections to argue that a failure on the part of the BCMR or the Secretary to act within ten months removes the agency's ability to give relief," Opp. 9, mistakenly implying that a ruling for Chief Vierrether might harm others. What others may wish to do if they have received either an adverse BCMR ruling or no decision at all within the statutory 10-month period is for them to decide. They would certainly have the option of (1) waiving any objection on § 212 grounds and hoping for a favorable decision or (2) proceeding directly to district court for review under the Administrative Procedure Act, 5 U.S.C. § 706 (1988), liberated from the duty to exhaust the BCMR remedy (assuming there is such a duty, *see Darby v. Cisneros*, 113 S.Ct. 2539 (1993)). The existence of these options for applicants who have *not* received a favorable decision within the 10-month period is no reason to hold that one who, like Chief Vierrether, *has* prevailed before the BCMR may be deprived of his victory by some untimely *further* review that is not required by any statute.

inaction is sound, *e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *see also, e.g.*, *Girouard v. United States*, 328 U.S. 61, 69-70 (1946), and is confirmed by the history of the 1993 Act.

Section 204 of the bill that became the 1993 Act would have provided, *inter alia*, that decisions of the BCMR are final agency action and not subject to further DOT review 10 months after a complete application has been filed. H.R. 2150, 103d Cong., 1st Sess. § 204(a) (1993). Why it was passed by the House, 139 Cong. Rec. H5538-48 (daily ed. July 30, 1993), is not a mystery. The Committee on Merchant Marine and Fisheries had noted continuing delays in Coast Guard BCMR cases[4] and rejected DOT's suggested changes. H.R. Rep. No. 146, 103d Cong., 1st Sess. 18, 27-28 (1993). The House report makes it clear that the purpose of § 204 was to clarify § 212. *Id.* 17.

The Senate bill contained no corresponding provision, S. 1052, 103d Cong., 1st Sess. (1993), 139 Cong. Rec. S16957, 16986-91 (daily ed. Nov. 22, 1993), and the Senate report is silent on the matter. S. Rep. No. 198, 103d Cong., 1st Sess. (1993). Unrelated differences between the two bills having been worked out informally, the measure passed both houses without a conference report. 139 Cong. Rec. S16991, H10928-46 (daily ed. Nov. 22, 1993). The floor

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[4] The House report refers to one case that had been filed over five years earlier (and which remained pending at the time the Petition was filed). *See* Pet. 11. A decision in that egregious case was finally dislodged earlier this month—more than six years after the officer's application was submitted—but only after a demand was faxed directly to Secretary Peña. It turns out that the BCMR had decided the matter before the summer of 1990. The funereal pace of subsequent review in DOT's Office of General Counsel dramatically illustrates why *Gazlay* and *Gottlieb*, in addition to being legally correct, are absolutely necessary as a practical matter. As long as BCMR decisions compete with matters such as airline mergers for the attention of that Office, members of the Coast Guard can expect to watch in helpless frustration as their careers wither—unless § 212 is enforced.

debates shed no light whatever on either the meaning or the fate of § 204. As enacted, the 1993 Act refers to neither the BCMR nor § 212. 107 Stat. 2419-55.

This legislative path leaves far too much unexplained to permit the inference the government suggests. The Senate's reasoning is a matter of conjecture, as is the House's logic in not insisting on § 204. From what *is* known, one could certainly argue that the fact that Congress did not overturn *Gazlay* and *Gottlieb* is more telling than its failure to codify them, but it is enough for present purposes to recall that "[i]t is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guaranty Corp v. LTV Corp.*, 496 U.S. 633, 650 (1990), *citing United States v. Wise*, 370 U.S. 405, 411 (1962).[5]

Third, given its concession, the government's suggestion that certiorari should be denied even as to the second Question Presented, Opp. 7, is puzzling. The Court of Appeals has yet to address the effect of § 212. The only cases that have done so reached the very conclusion for which Chief Vierrether argues. They are awaiting briefing and argument in the District of Columbia Circuit. The issue is a recurring one because of the Secretary's failure to comply with the 10-month deadline in a significant number of cases, and Chief Vierrether has a right to have it decided on the merits by *some* court. The proper course is not to deny certiorari but to grant, vacate and remand.

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[5] Drawing the inference proposed by the government would also give the Senate power to overturn judicial decisions and thereby make law unicamerally and without presidential assent. The Constitution certainly prohibits this if it were attempted by affirmative act. U.S. Const. art. I, §§ 1, 7, cl. 2-3; *Patterson, supra*; *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 944-59 (1983). *A fortiori*, it is impermissible by *in*action.

2. The Coast Guard's failure to afford Chief Vierrether the trial-type hearing and other important procedural protections conferred by its own regulations cannot be sustained on the basis that an agency can *change* or *modify* its regulations. *Compare* Opp. I (respondent's version of third question), 10. The regulations guaranteeing the right to a hearing were precisely the same before, during and after the program through which Chief Vierrether was discharged. All the Coast Guard did was to announce that the regulations were being "suspended" for those to be RIFed who had more than eight years' service; they remained in force for other personnel with over eight years' service. The fact that Chief Vierrether was not the only victim of the Coast Guard's unlawful "suspension" of the hearing regulations is hardly a defense, as the government implies. Opp. 10.

As the Court of Military Appeals recently observed, "[w]ith regard to administrative-discharge procedures, a servicemember is afforded many due process protections, mostly spelled out in service regulations but having their foundation in the Constitutional principle that no person may be deprived of property without due process of law." *United States v. Gansemer*, 38 M.J. 340, 341 (C.M.A. 1993) (citations omitted). Service regulations such as those the Coast Guard "suspended" are therefore a key source of protection for GIs. Agency adherence to them must be strict, especially since constitutional protections may not apply in the same manner as they do in civilian life. *E.g.*, *Weiss v. United States*, 113 S.Ct. 752, 760 (1994). If service regulations can be applied to some but not to others under the guise of a power of suspension that has no statutory foundation, as was done here, the rights conferred become illusory.

3. Finally, the government's dismissive treatment of the fact that Chief Vierrether was not only "RIFed" but barred from any further military service (and subjected to

reduced civilian employment prospects) disregards the realities of both military and civilian life. It strains credulity to claim that there is nothing derogatory about barring a career Chief Petty Officer with nearly 18 years' service from reenlisting. Opp. 10. Such a bar is in no sense "neutral." If it were, the Coast Guard would not have regulations affording such key rights as prior notice and an opportunity for a trial-type hearing before career personnel can be denied reenlistment. Pet. App. 4-6. Nor are demobilization and a bar to reenlistment simply two sides of the same coin, Opp. 10, as the thousands of GIs who were demobilized after World War II only to be called up again a few years later for the Korean War can attest.

The government cites *Giglio v. United States*, 17 Cl. Ct. 160, 169-70 (1989), and *Keef v. United States*, 185 Ct. Cl. 454, 467-68 (1968), for the proposition that "longevity alone does not justify the imposition of a hearing requirement." Opp. 11. Passing over the fact that the cited portion of *Giglio* is dictum (Sergeant Giglio having been afforded an evidentiary hearing, *id.* at 163), the agency regulations at issue in Chief Vierrether's case acknowledge longevity as a pertinent factor since they confer hearing rights on personnel with over eight years' service. Pet. 4-6.

More fundamentally, the government's comment misses the point. It is not merely that "involuntary release of a senior enlisted man would inevitably raise questions in the minds of prospective employers." Andrew S. Effron, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 Harv. Civ. Rgts.—Civ. Lib. L. Rev. 227, 254 (1974), *quoted at* Pet. 25. That harm is greatly magnified where, as here, the career servicemember is also barred from reenlisting in the future. Whether or not longevity alone is enough, therefore, longevity plus an RE-4 reenlistment code triggers the due process right to a

hearing.[6]

Conclusion

For the foregoing reasons and those previously stated, certiorari should be granted. The decision of the Court of Appeals should be vacated and the case remanded with instructions to address the effect of § 212 where the 10-month period expires before the Secretary reviews the BCMR's decision.

Respectfully submitted.

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[6] *Keef*, the other case relied on by the government, is inapposite because it involved an RE-*2*, not an RE-*4*. Pet. 24-25. "An RE-4 code is the worst of all because it declares the veteran ineligible to reenter military service of any kind in any capacity." Brief *Amicus Curiae* of Vietnam Veterans of America 3 n.2. "Employers and other members of the community are bound to wonder why someone who had served honorably for nearly 18 years wasn't welcome back for two more. That is what 'stigma' is all about." *Id.* 4.